Decr 12. '78 Arg'd N. H. Swayne

9 Wall. p. 455
Oct. 7. 1870.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~417~~ 418.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR.

VS.

KANSAS PACIFIC RAILWAY COMPANY, DEFENDANT IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

Jurisdiction 245

Filed ~~August~~ , 1877.

SUPREME COURT OF THE UNITED STATES

No. 749.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR.

VS.

KANSAS PACIFIC RAILWAY COMPANY, DEFENDANT IN ERROR.

TRANSCRIPT OF RECORD.

IN THE CIRCUIT COURT OF THE UNITED STATES

FOR THE DISTRICT OF KANSAS.

THE UNITED STATES OF AMERICA

VS.

THE KANSAS PACIFIC RAILWAY COMPANY.

INDEX.

	Original	Print.
Petition	1	1
Precipe	5	3
Summons	5	3
Demurrer	7	4
Journal Entry	8	5
Journal Entry	8	5
Stipulation	9	5
Amended Petition	9	6
Answer	15	9
Demurrer to Answer	20	11
Stipulation waiving Jury	21	12
Journal Entry	22	12
Answer	23	13
Motion for Judgment for Defendant	23	13
Judgment	24	14
Certificate	36	29
Writ of Error	37	29
Citation	38	30

In the Circuit Court of the United States for the district of Kansas.

THE UNITED STATES OF AMERICA,
vs.
THE KANSAS PACIFIC RAILWAY COMPANY.

Be it remembered that on this day, to wit: April 6, 1875, the said plaintiff, by its solicitor, filed in the clerk's office of said Court its petition and precipe in said entitled action, which said petition and precipe are in the words and figures following, to wit:

Petition.

In the Circuit Court of the United States for the district of Kansas.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
THE KANSAS PACIFIC RAILWAY COMPANY, DEFT. } Petition.

The said plaintiff, the United States of America, for cause of action against the said defendant, the Kansas Pacific Railway Company, shows to the Court that the said defendant is a corporation duly organized and doing business under and by virtue of the laws of the State of Kansas.

That said corporation was originally known as the Leavenworth, Pawnee and Western Railroad Company, and was created by an act of the Legislative Assembly of the Territory of Kansas at its first session in the year of our Lord one thousand eight hundred and fifty-five. That afterwards, to wit: on or about the sixth day of June, in the year of our Lord one thousand eight hundred and sixty-three, the name of said corporation was duly changed from the Leavenworth, Pawnee and Western Railroad Company to the Union Pacific Railway Company, Eastern Division. That afterwards, to wit: on or about the third day of March in the year of our Lord one thousand eight hundred and sixty-nine, the name of the said corporation was duly changed from the Union Pacific Railway Company, Eastern Division, to the Kansas Pacific Railway Company.

And the said plaintiff further says that heretofore, to wit: on or about the first day of January in the year of our Lord one thousand eight hundred and sixty-four, the said defendant commenced the building and construction of a line of railroad from a point at or near the mouth of the Kansas river, westward, to intersect with the Union Pacific Railroad, and thereafter continued to build and construct said railroad, and completed the same on the second day of November, in the year of our Lord one thousand eight hundred and sixty-nine.

And the plaintiff further shows that for the purpose of aiding the defendant in the construction of its said railroad as pro-

vided by the act of Congress, entitled "An Act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military and other purposes," approved July 1st, A. D. 1862, and the various acts amendatory thereto, plaintiff issued and delivered to the defendant, bonds of the United States of America to the amount of sixteen thousand ($16,000) dollars for each and every mile of said road from the eastern terminus thereof to a point three hundred and ninety-three and fifteen-sixteenth miles westward therefrom, amounting in the aggregate to the sum of six millions three hundred and three thousand ($6,303,000) dollars, which said bonds were and are payable in thirty years after their date, with interest at the rate of six per cent. per annum, payable semi-annually.

And the plaintiff further shows that said bonds were so issued and delivered to the defendant upon the express terms and condition, among other things, that the said defendant should repay to the United States the full amount of said bonds so issued and delivered to said defendant, together with all interest thereon, which should be paid by the plaintiff, and that after said road should be completed, until said bonds and interest should be paid by the defendant to the plaintiff, at least five per centum of the net earnings of said road should be annually applied to the payment thereof.

And the plaintiff further says that the said road was completed on the second day of November in the year of our Lord one thousand eight hundred and sixty-nine, and that the net earnings of said road from said second day of November, A. D. 1869, to the thirty-first day of October, A. D. 1874, amounted to the sum of six millions, one hundred and seventy-six thousand, six hundred and two dollars and sixty cents, ($6,176,602.-60) whereupon there became and was due and payable from said defendant to said plaintiff on account of the aforesaid five per centum of the net earnings of said road, so conditioned to be paid as aforesaid, the sum of three hundred and eight thousand, eight hundred and thirty dollars and thirteen cents ($308,-830.13.)

Plaintiff further says that on the 14th day of November, 1874, the Secretary of the Treasury demanded of the Treasurer of the said Kansas Pacific Railway Company, defendant herein, payment to the United States within sixty days therefrom, of the said sum of three hundred and eight thousand, eight hundred and thirty dollars and thirteen cents, ($308,830.13) but the said defendant neglected and refused, and still neglects and refuses to pay the said sum of three hundred and eight thousand, eight hundred and thirty dollars and thirteen cents, or any part thereof, and the said sum of three hundred and eight thousand, eight hundred and thirty dollars and thirteen cents, ($308,830.13) so being five per centum of the net earnings of

said road from its completion to the thirty-first day of October, A. D. 1874, still remains due and unpaid.

Wherefore plaintiff demands judgment against said defendant for the sum of three hundred and eight thousand, eight hundred and thirty dollars and thirteen cents, ($308,830,13) with interest thereon from the fourteenth day of January, A. D. 1875, at the rate of six per cent. per annum, together with costs.

GEO. R. PECK,
United States Attorney, District of Kansas.

Endorsed: No. 1239, Circuit Court U. S. District of Kansas, The United States of America vs. the Kansas Pacific Railway Company. Petition. Filed April 6, 1875. A. S. Thomas, Clerk. Geo. R. Peck, U. S. Attorney for plaintiff.

Precipe.

In the Circuit Court of the United States for the District of Kansas.

THE UNITED STATES OF AMERICA, PLAINTIFF, *vs.* THE KANSAS PACIFIC RAILWAY COMPANY, DEFT. } Precipe.

The clerk of said Court will issue summons against the defendant in the above entitled case directed to the U. S. Marshal for said District, returnable according to law.

Suit brought for the recovery of money. Amount claimed, $308,830$\frac{13}{100}$, with interest thereon from the 14th day of January, A. D. 1875, at the rate of six per cent. per annum, together with the costs of suit.

GEO. R. PECK,
United States Attorney for the District of Kansas.

Endorsed: No. 1239. Circuit Court United States for the District of Kansas. The United States of America vs. The Kansas Pacific Railway Company. Precipe. Filed April 6, 1875. A. S. Thomas, clerk. Geo. R. Peck, U. S. Att'y.

And on this day, to wit: April 6th, 1875, the clerk of said Court issued a writ of summons in said entitled action, which said writ of summons, with the endorsements and Marshal's return thereon, is in the words and figures following, to wit:

Summons.

CIRCUIT COURT OF THE UNITED STATES OF AMERICA,
District of Kansas, ss.

The United States of America to the Marshal of the District of Kansas, greeting:

You are hereby commanded to notify the Kansas Pacific Railway Company that it has been sued by the United States of America in the Circuit Court of the United States for the District of Kansas, and that unless it answer by the sixth day

of May, A. D. 1875, the petition of the said the United States of America against it filed in the clerk's office of the said Court, such petition will be taken as true, and judgment rendered accordingly. You will make due return of this writ on the 16th day of April, A. D. 1875.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Topeka, in said District, this 6th day of April, A. D. 1875.

[SEAL.] A. S. THOMAS, *Clerk.*

Endorsed: Suit brought for the recovery of money. Amount claimed, $308,830 $\frac{13}{100}$, with interest from the 14th day of January, A. D. 1875, at the rate of 6 per cent. per annum, together with the costs of suit. Geo. R. Peck, U. S. Attorney District of Kansas, Attorney for plaintiff. No. 1239. Circuit Court of the United States District of Kansas. The United States of America vs. the Kansas Pacific Railway Company. Summons. Issued April 6th, 1875. Returnable April 16, 1875. Geo. R. Peck, U. S. Att'y Dist. of Kansas, Attorney for Plaintiff.

U. S. Marshal's Return.

District of Kansas, ss.

Rec'd this writ April 6, 1875, and for return of same I certify that I executed the same at Kansas City on the 10th day of April, 1875, by delivering to Mr Lyforde, personally, a true and certified copy hereof, with all the endorsements thereon. He, said Lyforde, being then and there the Gen'l Sup't of said defendant, the Kansas Pacific Railroad Company. Also served same by delivering a like copy to E. G. Ege, personally, at Shawnee Co., State and District of Kansas, he being the agent of said defendant at Topeka, Kansas, within said District, and ~~upon~~ Respectively whom service is designated to be made.

W. S. TOUGH, *U. S. Marshal,*
By D. J. KELLER, *Deputy.*

Marshal's fees: For service of writ, $4.00
" travel 70 miles, @ 6c., 4.20—8.20

Filed April 14, A. D. 1875. A. S. Thomas, clerk.

And on this day, to wit, May 5, 1875, the defendant, by its Attorney, filed in the Clerk's office of said Court its demurrer in said entitled action, which said demurrer is in the words and figures following, to wit:

Demurrer.

Circuit Court of the United States, District of Kansas.

THE UNITED STATES, PLAINTIFF,
vs.
THE KANSAS PACIFIC RAILWAY COMPANY, DEF'T. } At law, Demurrer.

The defendant demurs to the petition of the plaintiff in this action on the ground that the same does not state facts sufficient to constitute a cause of action at common law.

J. P. USHER, *Defendant's Attorney.*

Endorsed: No. 1239. Circuit Court of the United States, District of Kansas. The United States of America vs. the Kansas Pacific Railway Company. Demurrer. J. P. Usher, Defendant's Attorney. Filed May 5, 1875. A. S. Thomas, clerk.

And on this day, to wit: Friday, June 11th, 1875, in the June Term, 1875, of said Court, in the record of the proceedings thereof in said entitled action, is the following entry, to wit:

Journal Entry.

THE UNITED STATES,
1239. *vs.*
THE KANSAS PACIFIC RAILWAY COMPANY.

It is ordered by the Court that the demurrer of the defendant to the plaintiff's petition be submitted to the Court upon printed briefs.

And on this day, to wit: Wednesday, December 1st, 1875, in the November Term, 1875, of said Court, in the record of the proceedings thereof in said entitled action, is the following entry, to wit:

Journal Entry.

THE UNITED STATES,
1239. *vs.*
THE KANSAS PACIFIC RAILWAY COMPANY.

Now comes said plaintiff by George R. Peck, U. S. Attorney, and also comes said defendant by J. P. Usher and C. E. Bretherton, its attorneys, and thereupon the defendant's demurrer to the plaintiff's petition, heretofore argued and submitted to the Court, is by the Court overruled, and thereupon leave is granted to said plaintiff to amend its petition within thirty days, if it so elects, serving upon defendant's counsel a copy of said amended petition by mail, and it is further ordered that said defendant have leave to answer by March first, and it is further ordered that this cause be and the same is hereby continued to the next term of this Court.

And on this day, to wit: February 17, 1876, there was filed in the Clerk's office of said Court, a stipulation in said entitled action, which said stipulation is in the words and figures following, to wit:

Stipulation.

In the Circuit Court of the U. S. for Dist. of Kansas.

UNITED STATES OF AMERICA,
vs.
KANSAS PACIFIC RAILWAY CO.

It is hereby stipulated that plaintiff may, if he so elect, file amended petition herein on or before March 15, 1876.

J. P. USHER and
C. E. BRETHERTON,
Deft's. Attys.

of May, A. D. 1875, the petition of the said the United States of America against it filed in the clerk's office of the said Court, such petition will be taken as true, and judgment rendered accordingly. You will make due return of this writ on the 16th day of April, A. D. 1875.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Topeka, in said District, this 6th day of April, A. D. 1875.

[SEAL.] A. S. THOMAS, *Clerk.*

Endorsed: Suit brought for the recovery of money. Amount claimed, $308,830$\frac{13}{100}$, with interest from the 14th day of January, A. D. 1875, at the rate of 6 per cent. per annum, together with the costs of suit. Geo. R. Peck, U. S. Attorney District of Kansas, Attorney for plaintiff. No. 1239. Circuit Court of the United States District of Kansas. The United States of America vs. the Kansas Pacific Railway Company. Summons. Issued April 6th, 1875. Returnable April 16, 1875. Geo. R. Peck, U. S. Att'y Dist. of Kansas, Attorney for Plaintiff.

U. S. Marshal's Return.

District of Kansas, ss.

Rec'd this writ April 6, 1875, and for return of same I certify that I executed the same at Kansas City on the 10th day of April, 1875, by delivering to Mr Lyforde, a true and certified copy hereof, with all the endorsements thereon. He, said Lyforde, being then and there the Gen'l Sup't of said defendant, the Kansas Pacific Railroad Company. Also served same by delivering a like copy to E. G. Ege, personally, at Shawnee Co., State and District of Kansas, he being the agent of said defendant at Topeka, Kansas, within said District, and upon whom service is designated to be made.

W. S. TOUGH, *U. S. Marshal,*
By D. J. KELLER, *Dep'ty.*

Marshal's fees: For service of writ, $4.00
" travel 70 miles, @ 6c., 4.20—8.20

Filed April 14, A. D. 1875. A. S. Thomas, clerk.

And on this day, to wit, May 5, 1875, the defendant, by its Attorney, filed in the Clerk's office of said Court its demurrer in said entitled action, which said demurrer is in the words and figures following, to wit:

Demurrer.

Circuit Court of the United States, District of Kansas.

THE UNITED STATES, PLAINTIFF,
vs.
THE KANSAS PACIFIC RAILWAY COMPANY, DEF'T. } At law, Demurrer.

The defendant demurs to the petition of the plaintiff in this action on the ground that the same does not state facts sufficient to constitute a cause of action at common law.

J. P. USHER, *Defendant's Attorney.*

Endorsed: No. 1239. Circuit Court of the United States, District of Kansas. The United States of America vs. the Kansas Pacific Railway Company. Demurrer. J. P. Usher, Defendant's Attorney. Filed May 5, 1875. A. S. Thomas, clerk.

And on this day, to wit: Friday, June 11th, 1875, in the June Term, 1875, of said Court, in the record of the proceedings thereof in said entitled action, is the following entry, to wit:

Journal Entry.

THE UNITED STATES,
1239. *vs.*
THE KANSAS PACIFIC RAILWAY COMPANY.

It is ordered by the Court that the demurrer of the defendant to the plaintiff's petition be submitted to the Court upon printed briefs.

And on this day, to wit: Wednesday, December 1st, 1875, in the November Term, 1875, of said Court, in the record of the proceedings thereof in said entitled action, is the following entry, to wit:

Journal Entry.

THE UNITED STATES.
1239. *vs.*
THE KANSAS PACIFIC RAILWAY COMPANY.

Now comes said plaintiff by George R. Peck, U. S. Attorney, and also comes said defendant by J. P. Usher and C. E. Bretherton, its attorneys, and thereupon the defendant's demurrer to the plaintiff's petition, heretofore argued and submitted to the Court, is by the Court overruled, and thereupon leave is granted to said plaintiff to amend its petition within thirty days, if it so elects, serving upon defendant's counsel a copy of said amended petition by mail, and it is further ordered that said defendant have leave to answer by March first, and it is further ordered that this cause be and the same is hereby continued to the next term of this Court.

And on this day, to wit: February 17, 1876, there was filed in the Clerk's office of said Court, a stipulation in said entitled action, which said stipulation is in the words and figures following, to wit:

Stipulation.

In the Circuit Court of the U. S. for Dist. of Kansas.

UNITED STATES OF AMERICA,
vs.
KANSAS PACIFIC RAILWAY CO.

It is hereby stipulated that plaintiff may, if he so elect, file amended petition herein on or before March 15, 1876.

J. P. USHER and
C. E. BRETHERTON,
Deft's. Attys.

(Endorsed): No. 1239. U. S. vs. Kansas Pacific R'y Co. Stipulation allowing plff. to amend Petition. Filed Feby. 17, 1876. A. S. Thomas, Clerk.

And on this day, to wit: March 28, 1876, the plaintiff, by its attorney, filed in the Clerk's office of said Court its amended petition in said entitled action, which said amended petition is in the words and figures following, to wit:

Amended Petition.

In the Circuit Court of the United States for the District of Kansas.

THE UNITED STATES OF AMERICA, PLAINTIFF, *vs.* THE KANSAS PACIFIC RAILWAY COMPANY, DEFT. } Amended Petition.

The said plaintiff, the United States of America, for cause of action against the said defendant, the Kansas Pacific Railway Company, shows to the Court that the said defendant is a corporation duly organized and doing business under and by virtue of the laws of the State of Kansas.

That said corporation was originally known as the Leavenworth, Pawnee and Western Railroad Company, and was created by an act of the Legislative Assembly of the Territory of Kansas at its first session in the year of our Lord one thousand eight hundred and fifty-five. That afterwards, to wit: on or about the 6th day of June, A. D. 1863, the name of said corporation was duly changed from the Leavenworth, Pawnee and Western Railroad Company to the Union Pacific Railway Company, Eastern Division. That afterwards, to wit: on or about the 3rd day of March, A. D. 1869, the name of the said corporation was duly changed from the Union Pacific Railway Company, Eastern Division, to the Kansas Pacific Railway Company.

And the said plaintiff further says that heretofore, to wit: on or about the 1st day of January, A. D. 1864, the said defendant commenced the building and construction of a line of railroad from a point at or near the mouth of the Kansas river, westward to intersect with the Union Pacific Railroad, and thereafter continued to build and construct said railroad and completed the same on the second day of November, A. D. 1869.

And the plaintiff further shows that for the purpose of aiding the defendant in the construction of its said railroad as provided by the act of Congress, entitled "An Act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military and other purposes," approved July 1st, A. D. 1862, and the various acts amendatory thereto, plaintiff issued and delivered to the defendant, bonds of the United States of America to the amount of sixteen thousand ($16,000) dollars for each and every mile of said

road from the eastern terminus thereof to a point three hundred and ninety-three and fifteen-sixteenths miles westward therefrom, amounting in the aggregate to the sum of six millions three hundred and three thousand ($6,303,000) dollars, which said bonds were and are payable in thirty years after their date, with interest at the rate of six per cent per annum, payable semi-annually.

And the plaintiff further shows that said bonds were so issued and delivered to the defendant upon the express terms and condition, among other things, that the said defendant should repay to the United States the full amount of said bonds so issued and delivered to said defendant, together with all interest thereon which should be paid by the plaintiff, and that after said road should be completed, until said bonds and interest should be paid by the defendant to the plaintiff, at least five per centum of the net earnings of said road should be annually applied to the payment thereof.

And the plaintiff further says that the said road was completed on the 2nd day of November, A. D. 1869.

That the net earnings of said road from said 2nd day of November, A. D. 1869, to the 31st day of December, A. D. 1869, amounted to the sum of one hundred and thirty-nine thousand nine hundred and forty-five dollars and four cents (139,945.04) whereupon there became and was due and payable from said defendant to said plaintiff on account of the aforesaid five per centum of the net earnings of said road so conditioned to be paid as aforesaid, the sum of $6,997.25, but the said defendant neglected and refused, and still neglects and refuses to pay the same, or any part thereof, though often requested so to do, and the whole thereof still remains due and unpaid, together with interest thereon from the 31st day of December, A. D. 1869, at the rate of six per cent. per annum.

That the net earnings of said road from 31st day of December, A. D. 1869, to the 31st day of December, 1870, amounted to the sum of $880,746.15, whereupon there became and was due and payable from said defendant to said plaintiff, on account of the aforesaid five per centum of the net earnings of said road so conditioned to be paid, as aforesaid, the sum of $44,037.30, but the said defendant neglected and refused, and still neglects and refuses, to pay the same, or any part thereof, though often requested so to do, and the whole thereof still remains due and unpaid, together with interest thereon from the 31st day of December, A. D. 1870, at the rate of six per cent. per annum.

That the net earnings of said road from the 31st day of December, A.D. 1870, to the 31st day of December, A.D. 1871, amounted to the sum of $1,409.927$\frac{87}{100}$, whereupon, there became and was due and payable from said defendant to said plaintiff, on account of the aforesaid five per centum of the net earnings of said road, so conditioned to be paid as aforesaid, the sum of 70.496\frac{39}{100}$, but the said defendant neglected and

refused, and still neglects and refuses to pay the same or any part thereof, though often requested so to do, and the whole thereof still remains due and unpaid, together with interest thereon from the 31st day of December, A.D. 1871, at the rate of six per cent. per annum.

That the net earnings of said road from the 31st day of December, A.D. 1871, to the 31st day of December, A.D. 1872, amounted to the sum of $1,494,447\frac{41}{100}$, whereupon there became and was due and payable from said defendant to said plaintiff on account of the aforesaid five per centum of the net earnings of said road, so conditioned to be paid as aforesaid, the sum of $74,722\frac{37}{100}$, but the said defendant neglected and refused and still neglects and refuses to pay the same or any part thereof, though often requested so to do, and the whole thereof still remains due and unpaid together with interest thereon from the 31st day of December, A.D. 1872, at the rate of six per cent. per annum

That the net earnings of said road from the 31st day of December, A.D. 1872, to the 31st day of December, A.D. 1873, amounted to the sum of $1,446.308\frac{20}{100}$, whereupon there became and was due and payable from said defendant to said plaintiff on account of the aforesaid five per centum of the net earnings of said road, so conditioned to be paid as aforesaid, the sum of $72,315\frac{44}{100}$, but the said defendant neglected and refused and still neglects and refuses to pay the same or any part thereof, though often requested so to do, and the whole thereof still remains due and unpaid together with interest thereon from the 31st day of December, A.D. 1873, at the rate of six per cent. per annum.

That the net earnings of said road from the 31st day of December, A.D. 1873, to the 31st day of October, A.D. 1874, amounted to the sum of $1,205,257\frac{41}{100}$, whereupon there became and was due and payable from said defendant to said plaintiff on account of the aforesaid five per centum of the net earnings of said road, so conditioned to be paid as aforesaid, the sum of $60,262\frac{87}{100}$, but the said defendant neglected and refused and still neglects and refuses to pay the same or any part thereof, though often requested so to do, and the whole thereof still remains due and unpaid together with interest thereon from the 31st day of October, A.D. 1874.

Wherefore plaintiff demands judgment against said defendant for the sum of three hundred and twenty-eight thousand, eight hundred and thirty-one dollars and fifty-eight cents, ($328,831.58) with interest at the rate of six per cent. per annum on $6,997\frac{25}{100}$ thereof from December 31st, 1869, on $44,037\frac{30}{100}$ thereof from December 31st, 1870, on $70,496\frac{39}{100}$ thereof from December 31st, 1871, on $74,722\frac{37}{100}$ thereof from December 31st, 1872, on $72,315\frac{40}{100}$ thereof from December 31st, 1873, and on $60,262\frac{87}{100}$ thereof from October 31st, 1874, together with the costs of suit.

GEO. R. PECK, *U. S. Attorney.*

Endorsed: No. 1239. Circuit Court, U. S. District of Kansas. The United States of America vs. the Kansas Pacific Railway Company. Amended Petition. I consent to the filing of this amended petition. March 28, 1876. J. P. Usher, Att'y. Filed March 28, 1876. A. S. Thomas, clerk. Geo. R. Peck, U. S. Attorney.

And on this day, to wit: May 30, 1876, the defendant, by its attorney, filed in the clerk's office of said Court its answer in said entitled action, which said answer is in the words and figures following, to wit:

Answer.

In the Circuit Court of the United States for the District of Kansas.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
THE KANSAS PACIFIC RAILWAY COMPANY, DEF'T. } Answer.

The defendant, by its attorneys, appears and answers.

I. Defendant admits that it is a corporation having changed its name from time to time as alleged by plaintiff

II. Defendant admits that it has constructed a railroad from the State line of Missouri, commencing near the mouth of the Kansas river, to the city of Denver, in Colorado Territory, but the defendant denies that it constructed said road during the time mentioned and alleged in the petition, and the defendant further denies that it has constructed its railroad so as to intersect and connect the same with the Union Pacific Railroad as by the petition it is alleged.

III. The defendant admits that the plaintiff did, after the execution of the mortgages and the making of the bonds by defendant as hereinafter stated, in pursuance of the Acts of Congress mentioned in said petition, viz: The Act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the government the use of the same for postal, military and other purposes, approved July 1st, 1862, and the several acts amendatory thereof issue to the defendant the bonds of the plaintiff, amounting to six million, three hundred and three thousand dollars, to aid in the construction of said railroad, but that none of said bonds were given to the defendant before the year 1866, that before said bonds were by plaintiff delivered to the defendant, the defendant being thereunto duly authorized by the tenth section of the Amendatory Act of July 2nd, 1864, had executed mortgages upon its said railroad from the State line at the mouth of the Kansas river aforesaid to a point west three hundred and ninety-three $\frac{15}{16}$ miles to secure a like number and amount of bonds and of the same tenor to be issued by the plaintiff to defendant as aforesaid, which bonds so issued by the defendant and having priority over the bonds issued by plaintiff, were nego-

tiated by the defendant when issued, and the proceeds thereof by the defendant expended in the construction of said railroad, and the defendant avers that the earnings of the said railroad have not been sufficient to pay the cost of maintainance and operating said road, the taxes upon the same and interest upon the said bonds of defendant having priority of the government as aforesaid.

IV. The defendant further answering, says, that having constructed its said railroad from the State line, as hereinbefore stated to the point three hundred and ninety-three $\frac{15}{16}$ miles west towards Denver, and being unable to proceed further with the construction of said road as contemplated by the before mentioned Acts of Congress, upon the application of defendant, the Act of Congress approved March 3rd, 1869, was passed, being the act entitled "An Act to authorize the transfer of lands granted to the Union Pacific Railway Company, Eastern Division, between Denver and the point of its connection with the Union Pacific Railroad to the Denver Pacific Railway and Telegraph Company and to expedite the completion of railroad to Denver in the Territory of Colorado."

That upon the passage of said last named act the defendant did, in accordance with the terms of said act, contract with the said Denver Pacific Railway and Telegraph Company for the construction of that portion of its railroad between Denver and Cheyenne to the intersection and junction of its said road at Cheyenne with the road of the Union Pacific Railroad Company, and the defendant by the authority of the said act did execute a mortgage upon the portion of its road as in said Act defined, that is to say, upon all that portion of its road lying between the aforesaid $393\frac{15}{16}$ mile post and the city of Denver, to secure its bonds, amounting to six million five hundred thousand dollars, being at a rate less than $32,000 per mile of said road, which bonds, in denominations of $1,000 00 each, defendant issued, having interest warrants attached at the rate of seven per cent. per annum, and negotiated said bonds, and, as contemplated by said act, applied the proceeds thereof in the construction of said railroad between the points last aforesaid, which railroad was completed and accepted by the President of the United States on the 19th day of October, 1872, and the defendant avers that by the true intent and meaning of the said several acts of Congress, all claims of the plaintiff to priority of payment from defendant or lien upon the railroad of defendant over the bonds of defendant secured by the mortgages as hereinbefore described and stated, was postponed, waived and surrendered by the United States, except the right to detain one-half the compensation for the transportation of troops, mails, &c., for the plaintiff.

And defendant avers that in no one year since the completion of the road to Denver, as aforesaid, has the earnings of said railroad been sufficient to pay operating expenses, repairs, replacements, taxes and interest of said bonds having priority

of lien over the said bonds of the plaintiff as hereinbefore stated.

V. The defendant, further answering, says that the plaintiff ought not to have and maintain its said action because the plaintiff has and does refuse to abide by and perform its said contracts with the defendant created by the said several acts of Congress in the petition mentioned and referred to, in this: that the plaintiff has and does refuse to convey to defendant the lands granted to defendant by virtue of said several acts of Congress, although the defendant had performed all the conditions of said grant by constructing the road and the payment of all fees and expenses of surveying, selecting and conveying said lands, and that the plaintiff unlawfully withholds patents from the defendant of all the odd numbered sections of land within the limits of twenty miles on either side of said railroad laying between the sixtieth and two hundredth mile post on defendants road west from the Kansas river, and further in this: that the plaintiff for and during a portion of the year 1872, and from thence hitherto has refused to make or pay the defendant any compensation for the transportation of troops, mails, supplies and public stores carried and transported by the defendant on its said railroad for the plaintiff, which service at fair and reasonable rates amount to two millions of dollars, wherefore the defendant says the plaintiff ought not to have its said action against the defendant.

VI. And the defendant further answering says that as to all and every of the allegations in said petition not hereinbefore admitted, traversed, or denied, the defendant denies that the same are true and demands strict proof thereof.

J. P. USHER, *Att'y for Deft.*

Endorsed: No. 1239. U. S. Cir. Court Dist. of Kansas. The United States of America vs. Kans. Pac. Ry. Co. Answer. I consent to filing of within answer. Geo. R. Peck, U. S. Atty. Filed May 30, 1876. A. S. Thomas, clerk. J. P. Usher, Defts. Atty.

And on this day, to wit: June 1, 1876, the Plaintiff by its Attorney, filed in the Clerk's office of said Court, it Demurrer to Answer in said entitled action, which said demurrer is in the words and figures following to wit:

Demurrer to Answer.

Circuit Court of the United States for the District of Kansas.

THE UNITED STATES OF AMERICA, PLAINTIFF, *vs.* THE KANSAS PACIFIC RAILWAY COMPANY, DEFT. } Demurrer to Answer.

The plaintiff demurs to the third, fourth and fifth grounds of defence set forth in the answer of the defendant herein, for the

reason that the same are insufficient in law to constitute a defence to said action.

GEO. R. PECK,
U. S. Attorney Dist. of Kansas.

(Endorsed): No. 1239. U. S. Circuit Court. The United States of America vs. the Kansas Pacific Railway Company. Demurrer to Answer. Filed June 1, 1876. A. S. Thomas, Clerk. Geo. R. Peck, U. S. Attorney.

And on this day, to wit: June 6th, 1876, there was filed in the Clerk's office of said Court a stipulation waiving jury in said entitled action, which said stipulation is in the words and figures following, to wit:

Stipulation waiving jury.

Circuit Court of the United States for the district of Kansas.

THE UNITED STATES OF AMERICA,
vs.
THE KANSAS PACIFIC RAILWAY COMPANY.

It is hereby stipulated and agreed by and between the parties hereto that a trial by jury be waived in this action, and that the issues of fact in the same be referred to W. H. Rossington, Esq., an attorney of this Court, to take the testimony herein, and to report his findings of fact to the Court, upon the issues herein, subject to any exceptions thereto, and that judgment be entered upon said report as of this term.

June 6th, 1876. GEO. R. PECK,
U. S. Att'y.

(Endorsed): No. 1239. U. S. vs. K. P. Stipulation. Filed June 6th, 1876. A. S. Thomas, Clerk.

And on this day, to wit: Tuesday, June 6, 1876, in the June Term, 1876, of said Court, in the record of the proceedings thereof in said entitled action is the following entry, to wit:

Journal Entry.

THE UNITED STATES OF AMERICA, PLAINTIFF,
1239. *vs.*
THE KANSAS PACIFIC RAILWAY COMPANY, DEFT.

This case came on this day, Geo. R. Peck appearing for plaintiff and J. P. Usher and C. E. Bretherton for defendant, and thereupon, by leave of the Court, the answer filed herein is withdrawn and an amended answer of general denial filed by defendant and a jury being waived by writing and the parties respectively consenting thereto, it is ordered that the issues of fact in this case be referred to W. H. Rossington, an attorney of this Court, and that referee preserve the testimony offered by either party and report the same to this Court with his report within thirty days from this date, and that either party have thirty days from the filing of such report to file ex-

ceptions thereto, and that such party file its brief with the Clerk with such exceptions, and the other party its brief within thirty days thereafter, and that the Clerk thereupon transmit the papers to the Judge for rendition of judgment which shall be entered as of this term.

And on this day, to wit: June 6, 1876, the defendant, by its attorneys, filed in the Clerk's office of said Court its answer in said entitled action, which said answer is in the words and figures following, to wit:

Answer.

Circuit Court of the United States, District of Kansas.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
THE KANSAS PACIFIC RAILWAY COMPANY, DEFT. } Answer.

The defendant for answer to the petition of the plaintiff denies each and every allegation therein contained.

J. P. USHER and
C. E. BRETHERTON,
Deft's. Attys.

Endorsed: No. 1239. Circuit Court of the United States, District of Kansas. The United States of America vs. the Kansas Pacific Railway Company. Answer. J. P. Usher, C. E. Bretherton, Defendant's attorneys. Filed June 6 1876. A. S. Thomas, Clerk.

And on this day, to wit: Nov. 29, 1876, the defendant, by its attorneys, filed in the Clerk's office of said Court its motion for judgment in said entitled action, which motion for judgment is in the words and figures following, to wit:

Motion for Judgment.

Circuit Court of the United States, District of Kansas.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
KANSAS PACIFIC RAILWAY COMPANY, DEF'T. } Motion for Judgment.

The defendant moves the Court for judgment on the special findings of fact reported by the referee.

J. P. USHER,
C. E. BRETHERTON,
Defendant's Attorneys.

Endorsed; No. 1239. Circuit Court of the United States, District of Kansas. The United States of America vs. the Kansas Pacific Railway Company. Motion for judgment for defendant. J. P. Usher, C. E. Bretherton, Att'ys for defendant. Filed Nov. 29, 1876. A. S. Thomas, Clerk.

And on this day, to wit: Friday, June 15th, 1877, in the June Term, 1877, of said Court, in the record of the proceedings thereof in said entitled action, is the following entry, to wit:

Judgment.

1239. UNITED STATES OF AMERICA, PLAINTIFF, *vs.* KANSAS PACIFIC RAILWAY CO., DEFENDANT.

The above cause came on this day for trial, a jury being duly waived by stipulation in writing filed herein, and the parties appeared by G. R. Peck and Thomas Ryan, counsel for plaintiff, and J. P. Usher and C. E. Bretherton, counsel for defendant, and on hearing the evidence adduced by either party, and the arguments of counsel, the Court finds specially the facts of the case to be as follows:

I. The plaintiff issued bonds to the defendant in aid of the construction of its railroad from the State line of Missouri $393\frac{15}{16}$ miles westward, pursuant to the act of Congress of July 1, 1862, and July 22, 1864, and gave no other pecuniary aid for the construction of the rest of the main line to Denver, 245 miles; or the branch to Leavenworth, 34 miles; and all the bonds were actually issued to defendant by plaintiff before its road was constructed beyond the 405th mile-post west from the State line.

II. The part of the road for which bonds were actually issued is $\frac{394}{678}$ of the length of the whole road.

III. The defendant operated its whole line of road and commenced to do business over the whole length of its road on September 1st, 1870. On the 2nd day of November, 1869, when it is alleged in the petition that the road was completed, it was only completed to Sheridan, 405 miles west from the State line, and about 11 miles beyond the end of the part of the road for which bonds were issued, and had been completed and operated to that point before November, 1868

IV. Although defendant did business to Denver, from September 1st, 1870, a very large additional expenditure towards the construction and equipment of its road was made during the years 1870, 1871 and 1872, as appears by the tabular statements of the expenses of defendant for construction and equipment, which are made exhibits A and B hereto and are to be read as part hereof annexed hereto.

V. Acceptance by the President was on October 19th, 1872, and defendant admits completion of road at that time.

VI. The amount of actual receipts and expenses of defendant from 1870 to 1874, both inclusive, are as stated in the table made exhibit "C" hereto, and which is made part hereof, with the exception of the item called "Depreciation" or "Expenses not Charged," and hereinafter referred to.

VII. In taking an account of net earnings, exception is taken by plaintiff to the following items of such expenses: 1. Depreciation or Expenses not Charged. 2. Construction. 3. Equipment. 4. Real Estate. 5. Expenses of the Land Department. 6. Interest on the funded or mortgage debt. 7. In-

terest on Government mortgage; the facts concerning which are hereinafter found.

VIII. Defendant has borrowed at the rate of sixteen thousand dollars per mile on first mortgage of that part of the road, for which it received bonds from the plaintiff, and also six millions and a half, or at the rate of about twenty-six thousand dollars per mile, on the rest of the main line, and six hundred thousand dollars on the Leavenworth branch, and the interest on these mortgages is the sixth item objected to. These mortgages, except the government mortgages, are as follows: 1st, to secure 2,240 30 years bonds of $1,000 each, issued under a first mortgage on the road, rolling stock and equipment, from the Missouri river to the 140th mile-post, dated August 1st, 1865, and made by the company under its then name of the Union Pacific Railway, (Eastern Division) to John Edgar Thompson and Henry M. Alexander, as trustees, principal payable in currency, interest at six per cent in gold. 2nd, to secure 4,063 bonds of $1,000 each, secured by first mortgage of the road, rolling stock and equipment west from the 140th mile-post to the 394th mile-post, in pursuance of a mortgage deed dated 1st June, 1866, made between the company by its former name to John Edgar Thomson and Adolphus Meier, bonds payable 30 years after date with interest at six per cent. in gold. 3rd, to secure 600 bonds of $1,000 each, payable 30 years after date principal interest at seven per cent in currency, secured by first mortgage of the Leavenworth branch, that is the railroad from Lawrence to Leavenworth, to John Edgar Thomson and Henry M. Alexander. 4th, to secure an issue of six million and one-half of bonds, payable in currency 30 years after date, with interest in gold at seven per cent., secured by first mortgage of the road, rolling stock and equipment from the 394th mile-post to Denver, and of the land grant from the 394th mile-post to Denver, estimated at 3,000,000 acres, and also of a mortgage subject to prior lien of the United States, of the road, rolling stock and equipment of the company from Wyandotte to the 394th mile-post, to John Edgar Thomson, Adolphus Meier and John A. Stewart, as trustees, dated 20th June, 1869.

IX. Large quantities of land have been granted by plaintiff to defendant, to aid its railroad, and the expenses of the management of such lands and their disposition form the fifth item excepted to by plaintiff, which expenses, $164,396.36, are shown in Exhibit "C," made part hereof.

X. The depreciation account or expenses not charged, which is the first item objected to, is an account which it contemplates the retention of part of the gross earnings of each year in hand as a reserve fund to replace the depreciation, or wear and tear, at a future time, but such reserve fund has no existence in cash or assets, and it is not the practice of railroads to keep such a reserve. If in ascertaining the net earnings, such depreciation account is properly deductible, the amount thereof is the sum of $1,999,247.46 as shown by Exhibit "D," made part hereof.

XI. At the date of the institution of this suit, it would have required a sum at least equal to the sum last named to put the road into complete repair.

XII. The items and method of statement of the depreciation account are shown in table D, annexed hereto, which is to be read as part hereof.

XIII. The construction account (second item objected to), represents additions to the roadway of the company, and the details of the amounts charged to this account by the company are shown on the table made exhibit A hereto, and which is made part hereof, which is correct. This account represents expenses of the character shown in said Exhibit "A," for work and material done and furnished for and upon the road after the road had been put in operation. These expenses were reasonably necessary for the operation and maintenance of the road. They were charged on the books of the Company to "Construction account," and paid for out of means derived from the road.

XIV. The equipment account (third item objected to) is for rolling stock, and the details of the amounts account are shown in the table made Exhibit B hereto, and made part hereof, amounting to $784,688.11.

XV. The real estate account (fourth item objected to) is the expense for real estate acquired after the completion of the road from time to time for enlargement of right of way, depot grounds, side tracks, &c., and credit account of the same name, the proceeds of similar real estate no longer required.

XVI. Interest on Government debt (last item objected to) means the half charges for transportation retained by Government.

XVII. If defendant is entitled to have the account stated as in exhibit C, the Court finds that there would be no net earnings.

XIX. Table made exhibit E hereto and which is made part hereof annexed, shows the earnings, expenses and net earnings for the years 1869, 1870, 1871, 1872, 1873 and 1874, after deducting all the expenses and deductions objected to by plaintiff the percentage thereof claimed to be payable to plaintiff by defendant, and amount of recovery which plaintiff would be entitled to if such deductions ought not to be made for each year.

XX. If plaintiff is entitled to have the account stated as in exhibit E, plaintiff would be entitled to judgment for the following sums:

First cause of action for part of 1868,	$ 1,143.20
Second cause of action for 1870,	12,273.74
Third cause of action for 1871,	37,405.03
Fourth cause of action for 1872,	62,826.45
Fifth cause of action for 1873,	48,930.04
Sixth cause of action for part of 1874,	52,167.45

With interest from the end of the respective years.

Conclusions of law.—And on the above facts I find pro forma as a conclusion of law that defendant is entitled to judgment in this action, to which the plaintiff excepts.

Wherefore it is by the Court considered and adjudged that defendant go hence without day and that plaintiff ought to pay the costs of this suit.

JOHN F. DILLON, *Judge.*

EXHIBIT A. DETAILS OF CONSTRUCTION ACCOUNT, 1870 TO 1874.

ACCOUNTS.	1870.	1871.	1872.	1873.	1874.	TOTAL.
Ballast,	$5,527.53					$5,527.53
Bridge and Culvert Masonry,	20,905.16	$10,593.08	$20.22			31,518.46
Bridge Superstructure and Trestles,	17,995.61	11,829.07	2,032.06			31,856.74
Buildings, Machine Shops, Engine Houses and Turn Tables,	141,765.22	30,784.32	3,417.25	$55.50		176,022.29
Buildings, Car Shops and Sheds,	30,361.90					30,361.90
Buildings, Stations and Warehouses,	63,398.86	26,501.60	8,123.46	15,783.64	$2,093.32	115,900.88
Buildings, Section and Tool Houses,	36,551.45	5,815.86	5,179.97	4,942.63	1,512.00	54,001.91
Buildings, Water Stations,	*111,168.73	34,015.54	7,796.09	6,512.82		159,493.18
Buildings, Fuel Stations,		3,648.04		3,209.20		6,857.24
Buildings, Hotels and Eating Houses,		4,239.94	9,654.38			13,894.32
Cattle Guards,		640.02	207.44			847.46
Chairs and Spikes,	†22,268.55	3,374.91	1,932.00	941.97		28,517.43
Cross Ties,	29,399.07	7,008.53	4,880.00	4,011.37		45,298.97
Ditching,		643.66				643.66
Engineering,	5,754.09	1,351.32				7,105.41
Fencing,		571.55		70.50		642.05
Frogs and Switches,		4,547.34	3,520.00	1,189.55		9,256.89
Fish Bars, Bolts, &c.,		223.79	1,078.45	8.32		1,310.56
Graduation,	60,170.38	11,750.61	10,668.44			82,589.43
Incidentals,	8,732.10	100,100.28	12.55			108,844.93
Iron Rails,	41,893.95	11,492.53	24,000.00	19,297.33		96,683.81
Laying and Surfacing Track,	23,363.31	6,103.34	2,125.00	1,986.46		33,578.11
Road Tools, and Machinery,						
Road Crossings,		123.15	23.04			146.19
Right of Way,	1,829.10	2,611.19	6,653.15	1,569.50	1,093.50	13,756.44
Snow fencing,		40,012.61	39,325.70	5,036.90		84,375.21
Stock Yards,		11,561.95	1,884.98	3,431.16		16,878.09
Surveys,	7,729.53	3,278.90	670.65			11,679.08
Telegraph Line,	2,497.19					2,497.19
	$631,311.73	$332,823.13	$133,204.83	$68.046.85	4,698.82	$1,170,085.36

* 1870 includes Buildings, Fuel Stations.

† 1870 includes Frogs and Switches.

EXHIBIT B. DETAILS OF EQUIPMENT ACCOUNT 1870 TO 1874.

ACCOUNTS.	1870.	1871.	1872.	1873.	1874.	TOTAL.
Cars, Passenger,	$64,113.91	$17,736.60				$81,850.51
Cars, Baggage, Mail and Express,		9,530.20				9,530.20
Cars, Freight,	157,063.77		$6,000.00			163,063.77
Cars, Ballast, Dump and Boarding,						
Cars, Hand and Track,	17,129.59	1,797.89				18,927.48
Incidentals,	653.22	151.50				864.72
Locomotives,	305,843.45	137,120.70				442,904.15
Shop Tools and Machinery,	59,960.47	7,366.81				67,327.28
	$604,764.41	$173,703.70	$6,000.00			$784,468.11

EXHIBIT C. STATEMENT OF EARNINGS AND EXPENSES, 1870 TO 1874.

EXPENSES.	1870.	1871.	1872.	1873.	1874.	TOTAL.
Operating expenses,	$2,480,040.46	$2,302,589.06	$2,229,265 77	$2,116,990 59	$1,671,045.57	$10,799,932.35
*Depreciation Account, or Expense not charged up,	405,543.36	405,776 55	404,890.09	376,840.13	401,188.33	1,992,247.46
*Construction Account, or improvements and additions to track, construction of side tracks, switches, bridges, &c., and right of way purchased,	631,311.73	332,823.13	133,204.83	68,046 85	4,698.82	1,170,085 36
*Equipment Account, or replacing and rebuilding Rolling Stock, Machinery, &c.,	604,764 41	173,703 70	6,000.00	.....	.....	784,468.11
*Real Estate purchased for Depot Grounds, &c., and expenses of same,	72,739 23	14,563.48	2,234.75	76 25	1,729.75	91,343.46
Discount, Interest and Exchange,	114,091.31	172,693.84	134,551.84	295,858.67	234,251.26	951,450.02
Insurance,	38,327 94	2,306.14	29,761 29	21,659.02	23,557.03	115,014.42
State, County and City Taxes,	94,461.31	79,806 89	87,807.04	117,846 21	123,658 40	503,579.85
Federal Taxes,	34,461.56	24,245.90	4,410.46	.....	22 15	63,140.07
Profit and Loss	.....	30,619.80	.....	.....	.....	30,619 80
*Expenses, Land Department,	51,744.24	23,030.26	24,812.73	29,253.46	35,555 67	164,396 36
Pooled Earnings on road 106 miles east of Denver,	.....	.....	.....	45 794,47	69,623.04	115,417.51
*Interest on Funded Debt prior to Government lien, viz:						
Leavenworth Branch Mortgage,	41,023.11	41,110.32	41,826 65	42,000,00	42,000.00	207,960 08
Main Line Mortgage, 1st 140th mile post,	152,176.21	146,749 29	148,852.00	155,836.80	150,528,00	754,142 30
Main Line Mortgage, 140th to 394th mile post,	269,553 96	265,140 79	273,924 68	282,662.92	273,033.60	1,364,315.95
Main Line Mortgage, 394th to 639th mile post,	521,286 70	509,413.66	509,413.66	522,559 11	502,622.40	2,565,195.53
	$984,039.98	962,414.06	974,016 99	1,002,958 83	968,184.00	4,891,613.86
*On Government lien, viz:						
50 per cent. Government Earnings withheld,	159,470.69	146,101 63	126,256 28	102,632 75	100,660.02	635,121.37
Total Expenses,	$5,668,996.22	$4,670,675.34	$4,156,627.07	$4,177,957.23	$3,634,174.14	$22,308,430 00
EARNINGS.						
Gross Earnings, including Government Transportation,	$2,974,820.81	$3,312,517.83	$3,723,713.18	$3,563,299.49	$3,356,749.95	$16,931,101 26
Pooled Earnings on Road 106 miles east of Denver,	26,590.43	47,845 48	6,777.44	.....	.....	81,213 35
Profit and Loss,	5,446.27	.....	11,240.81	13,450.35	17,427.57	47,565,00
Sales of Real Estate,	.....	3,098.40	2,582.64	800.26	8,381.40	14,862.70
Total Earnings,	3,006 857.51	3,363,461.71	3,744,314.07	3,577 550.10	3,382,558.92	17,074,742 31
Deficit,	2,662,138.71	1,307,213.63	412,213.00	600,407.13	251,615 22	5,233,687.69
Total,	$5,668,996.22	$4,670,675.34	$4,156,627.07	$4,177,957.23	$3,634,174.14	$22,308,430.00

NOTE.—The items of expenses marked * are objected to by plaintiff.

EXHIBIT D. DEPRECIATION ACCOUNT.

Estimate of Deterioration of Track from 1870 to 1874.

Necessary Average Renewals.	Per Mile.	Average Per Year.	Price.	Amount per Mile per year.	Amount per year.	Total.
Cross Ties, every 6 years.	2,640 Ties.	440.	75 cents each.	$330.00	$222,090.00.	
Iron Rails, every 8 years.	88 Tons Iron.	11.	$40.00 per ton.	440.00	296,120.00.	$518,210.00.

	1870.	1871.	1872.	1873.	1874.	Total.
Necessary Expense for Renewal Cross Ties, 673 miles,	$222,090.00	$222,090.00	$222,090.00	$222,090.00	$222,090.00	$1,110,450.00
Actual Expense,	87,392.37	86,924.95	55,064.99	100,930.65	89,549.02	419,861.98
Deterioriation of Track,	134,697.63	135,165.05	167,025.01	121,159,35	132,540.98	690,588.02
Necessary Expense for Renewal of Iron Rails, 673 miles,	296,120.00	296,120.00	296,120.00	296,120.00	296,120.00	1,480,600.00
Actual Expense,	27,274.27	25,508.50	58,245.92	40,439.22	27,472.65	178,940.56
Deterioration of Track,	268,845.73	270,611.50	237,874.08	255,680.78	268,647.35	1,301,659.44
Total Deterioration,	$403,543.36	$405,776.55	$404,899.09	$376,840.13	$401,188.33	$1,992,247.46

EXHIBIT E STATEMENT OF ACCOUNT OF EARNINGS AND EXPENSES, DEDUCTING EXPENSES OBJECTED TO BY THE GOVERNMENT.

EXPENSES.	November and December of 1869.	1870.	1871.	1872.	1873.	1874.	TOTAL.
Operating expenses,	$262,005.46	$2,480,040.46	$2,302,589.96	$2,229,265.77	$2,116,990.59	$1,671,045.57	$10,799,932.35
Discount, Interest and Exchange,	9,114 03	114,091.31	172,693.84	134,554.84	295,858.67	234,251.36	951,450 02
Insurance,		38,327 94	2,306.14	29,161 21	21,659.02	*23,557.03	115,014.42
State, County and City Taxes,		94,461.31	79,806.89	87,807.01	117,846 21	123,658 40	503,579.85
Federal Taxes,		34,461.56	24,245.90	4,410.46		22 15	63,140.07
Profit and Loss,	593.88		30,619.80				30,619 80
Pooled Earnings on road 106 miles east of Denver,					45,794.47	69,623 04	115,417.51
Total Expenses,	$271,713 37	$2,761,382.58	$2,612,262.53	$2,485,202.40	$2,598,148.96	$2,122,157.55	$12,579,154 02

EARNINGS.	November and December of 1869.	1870. *From Sept. 1.	1871.	1872.	1873.	1874. *To Nov. 1.	TOTAL.
Gross Earnings, including Government Transportation,	$294,577.53	$2,974,830.81	$3,312,517.85	$3,723,713.18	$3,563,299.49	$3,356,749.95	$16,931,101 26
Pooled Earnings on Road 106 miles east of Denver,		26,590.43	47,845 48	6,777.44			81 213 35
Profit and Loss,		5,446.27		11,240.81	13,450.35	17,427.57	47,565,00
Total Earnings,	$294,577.53	3,006,867.51	3,360,363.31	3,741,731.43	3,576,749.84	3,374,177.52	17,059,879.61
Total Expenses,	$271,713.37	$2,761,382 58	$2,612,262.53	$2,485,202.40	$2,598,148.96	$2,122,157.55	$12,579 154.02
Net Earnings,	$22,864 16	½ of $245,474.93 *=81,824.97	$784,100.78	$1,256,529.03	$978,600.88	$1,252,019.97	
Five per cent. of above	$1,143.20	5 % of ½ of $12,273 74 *=4,091.24	$37,405.03	$62,826.45	$48,930 04	5/6 of 5 % of $62,600 99 *=52,167.45	
Amounts to be recovered:							
First Count of Petition	$1,143.20	5 % of ½ of $12,273.74 *=4,091.24	$37,405.03	$62,826.45	$48,930.04	*$52,167.45	
Second " "							
Third " "							
Fourth " "							
Fifth " "							
Sixth " "							

UNITED STATES OF AMERICA,
District of Kansas, ss.

I, A. S. Thomas, Clerk of the Circuit Court of the United States of America, for the District of Kansas, do hereby certify the foregoing to be a true, full and perfect copy from the record of all the proceedings in the action of the United States of America vs. the Kansas Pacific Railway Company, No. 1239 in said Court.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at my office in Topeka, in said District of Kansas, this 9th day of August, A.D. 1877.

A. S. THOMAS, *Clerk.*

UNITED STATES OF AMERICA, *ss.*

The President of the United States to the Judges of the Circuit Court of the United States in and for the district of Kansas:

Because in the record and proceedings and pleadings, as also in the rendition of the judgment of a plea which is the said Circuit Court before you, between the United States of America, plaintiff, snd the Kansas Pacific Railway Company, defendant, a manifest error has happened, to the great damage of the said United States of America, as by the complaint appears.

We, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States together with this writ, so that you have the same at Washington on the second Monday of October, A. D. one thousand, eight hundred and seventy-seven, in the Supreme Court then and there to be held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness Hon. Morrison R. Waite, Chief Justice of the said Supreme Court, the 20 day of June, in the year of our Lord one thousand eight hundred and seventy-seven.

[SEAL.] A. S. THOMAS,
Clerk of the Circuit Court of the United States, for the District of Kansas.

Issued at the office of the Clerk of the Circuit Court at Topeka, in said District. In testimony whereof the said Clerk sets his hand and affixes the seal of said Circuit Court the day and year last above written.

A. S. THOMAS, *Clerk.*

Allowed.
C. G. FOSTER, *Judge.*

In the Supreme Court of the United States

OCTOBER TERM, 1878.

THE UNITED STATES, PLAINTIFF IN ERROR,
vs.
THE KANSAS PACIFIC RAILWAY COMPANY.
No. 418.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1878.

THE UNITED STATES, PLAINTIFF in error,
vs.
THE KANSAS PACIFIC RAILWAY Company.
No. 418.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

An action was brought by the United States in the court below against the Kansas Pacific Railway Company to recover 5 per cent. of its net earnings.

The claim of the United States is founded upon the last clause of section 6, act July 1, 1862 (12 Stat., 493), which is in these words: "And after said road is completed, until said bonds and interest are paid, at least 5 per centum of the net earnings of said road shall also be annually applied to the payment thereof."

The original grant to the Kansas Pacific Railway Company was made by an act of Congress approved July 1, 1862 (12 Stat., 489). It was amended or affected by the acts of July 2, 1864 (13 Stat., 356), March 3, 1865 (13 Stat., 573), July 3, 1866 (14 Stat., 79), a joint resolution of April 10, 1869 (16 Stat., 56), and acts of May 6, 1870 (16 Stat., 121), March 3, 1873 (17 Stat., 508), June 20, 1874 (18 Stat., 111, 112), June 22, 1874 (18 Stat., 200).

On July 1, 1862, was approved the act of Congress entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the government the use of the same for postal, military, and other purposes." (12 Stat., 489.)

By section 9 the Leavenworth, Pawnee and Western Railroad Company of Kansas (an existing corporation), was authorized to construct a railroad and telegraph line from the Missouri River, at the mouth of the Kansas River, so as to connect with the Union Pacific at the initial point on the one hundredth meridian, "*upon the same terms and conditions in all respects* as are provided in this act for the construction of the railroad and telegraph line first mentioned" (Union Pacific).

The road so authorized to be constructed was one of several lines converging to the said initial point from the western termini of various existing railroads in the States east of the Missouri, which the said act made provision for in order to connect the railrord system of the Northwest with the main Pacific line, and this road was to be the Missouri branch or connection.

It was regarded evidently at the time as the principal or most prominent eastern connection since it was au-

thorized by the act of 1862 (section 10), after reaching the one hundredth meridian, to unite with the Union Pacific upon equal terms in constructing any unfinished portion of the main line, and by section 12 of the act of 1864 (13 Stat., 356), to go on with the trunk-line, upon default of said company.

The corporate title of the said Kansas corporation has been changed first to "Union Pacific Railway Company, Eastern Division," and then to "Kansas Pacific Railway Company," its present designation.

The "terms and conditions" of the organic act of 1862, upon which it was authorized to build this connection, consisted of certain grants in aid to and certain corresponding obligations imposed upon the companies named in the act.

The grants were, in brief, a right and donation of way through the public lands (§ 2, 1862, § 3, 1864), a land-grant (§ 3, 1862, § 4, 1864), a grant of credit by loan of bonds of the United States (§ 5, 1862, § 10, 1864, § 1, 1865); and these grants were made on condition that the company should pay the bonds at maturity, keep its railroad and telegraph line in repair and use, at all times perform certain services for the government as required; and on condition, also, that "all compensation (subsequently reduced to one half) for services rendered for the government shall be applied to the payment of said bonds and interest until the whole amount is fully paid, * * * *and after said road is completed, until said bonds and interest are paid, at least 5 per centum of the net earnings of said road shall be also annually applied to the payment thereof.*"

The provision as to said bonds was (section 5, 1862) that the Secretary of the Treasury, "for the purpose

herein mentioned," should issue to the company, on the completion and equipment of forty (afterward twenty) miles of its road, one-thousand-dollar bonds of the United States to the amount of sixteen per mile for such section of forty miles. The bonds were payable thirty years after date, with interest at 6 per cent., payable semi-annually.

To secure their repayment, their issue and delivery to the company was declared *ipso facto* to constitute "*a first mortgage on the whole line of the railroad and telegraph, together with the rolling-stock, fixtures and property of every kind and description, and in consideration of which said bonds may be issued*," and, on refusal or failure of the company to redeem said bonds, or any part of them, "*the said road, with all the rights, functions, immunities, and appurtenances thereunto belonging, and also all lands granted to the said company by the United States which at the time of said default shall remain in the ownership of the said company, may be taken possession of by the Secretary of the Treasury for the use and benefit of the United States: Provided*, This section shall not apply to that part of any road now constructed."

These provisions were modified by section 10, 1864, so as to permit each company, on completion of a section, to issue its own bonds to the same amount and of like tenor with the guaranteed bonds as first-mortgage bonds "*on their respective railroad and telegraph lines*," and the lien of the United States bonds was subordinated to that of the bonds so "*authorized to be issued on their respective roads, property, and equipments, except as to the provisions of the sixth section of the act to which this act is an amendment, relating to the transmission of dispatches and the transportation of mails, troops, munitions*

of war, supplies, and public stores for the Government of the United States."

The preceding section, however (§ 9. 1864), had authorized any of the eastern connections to connect with the trunk west of the initial point "in case such company shall deem such westward connection more practicable or desirable; and, in aid of the construction of so much of its road and telegraph line as shall be a departure from the route hereinbefore provided for its road, such company shall be *entitled to all the benefits and be subject to all the conditions and restrictions of this act: Provided further, however, That the bonds of the United States shall not be issued to such company for a greater amount than is hereinbefore provided, if the same had united with the Union Pacific Railroad on the one hundredth degree of longitude, nor shall such company be entitled to receive any greater amount of alternate sections of public lands than are also herein provided.*"

This limitation of the bonds issuable is also mentioned in the twelfth section of the act in connection with authority given the before-mentioned railroad to build a branch from Leavenworth to Lawrence.

By an act of March 3, 1865 (13 Stat., 504), the roads provided for by before-mentioned acts were authorized to issue their 6 per centum thirty-year bonds upon their separate roads.

Again, by act of July 3, 1866 (14 Stat., 79), amending the act of 1864, the said railroad company was authorized to designate the general route of its road on a different plan from that previously directed; but, in connection with the change, *the previous limitation as to the number of bonds issuable to it is repeated*, and it is also provided "that said company shall connect their line

of railroad and telegraph with the Union Pacific Railroad, but not at a point more than fifty miles westwardly from the meridian of Denver, in Colorado."

In accordance with the terms of the statutes cited, bonds were issued to the Kansas Company by the United States, to the amount of $6,303,000, and the court finds that "the part of the road for which bonds were issued is $\frac{394}{673}$ of the length of the whole road." (Record, p. 14, finding II.)

The company operated its whole line of road (to Denver, Colo.), and commenced to do business over the whole length of its road on September 1, 1870. The 394 miles of road upon which bonds were issued were completed and operated before November, 1868. (Record, p. 14.)

ASSIGNMENT OF ERROR.

The court erred in entering judgment in favor of the defendant.

ARGUMENT.

AS TO COMPLETION.

I.

The date when the road was open for business through its entire length must be considered to be the time when the road was completed, ready for the service contemplated by the statute. September 1, 1870 (Record, 14, finding III), is, therefore, the date of completion, as claimed by the United States. There is no question of the acceptance of successive sections of the road by the President of the United States, upon which depended the issue of subsidy bonds, as all the bonds which the company was entitled to had been issued before November, 1868. (Record, 14.) Whatever was the nature of the acceptance of the road by the President, as found by the court (Record, 14, finding V), the acceptance can bear no relation to the completion of the road as a whole upon which, from Kansas City to Denver, passengers and freight were carried.

The act of 1862, or any other act relating to the "Pacific" railroads, does not vest any authority in the President of the United States to accept a road built under its provisions. The obligation to complete the road rested solely on the company.

The completion of the road was, therefore, to be determined by what the company did in building it. Section 4, act of 1862, provides that the road should be "ready for the services contemplated by this act," which service, as stated in section 3, was "the safe and speedy

transportation of the mails, troops, munitions of war, and public stores."

It would seem to be clear that this language did not require the road to be in the highest condition of completeness attainable in a first class railroad, but only in such state of completion as to be ready for the service contemplated by the act.

The statement in finding IV (Record, p. 14), that a very large additional expenditure toward the construction and equipment of the Kansas road was made during the years 1870, 1871, 1872, does not antagonize the position of the United States, because the tables of expenditures on pages 19 and 21, referred to in the findings, show that the greater portion of these expenditures were made during the year 1870, and presumably before September 1 of that year, when the road was opened through, as the road would not have been ready to carry passengers and freight except when in a good running condition, and such condition was doubtless reached by large expenditures. The expenditures made in the years 1871 and 1872 are comparatively small, and no more than usual on railroads.

II.

It is of the first importance to meet the possible objections to be raised against the consideration by the court at the outset of the claim of the United States. In effect, the position of the United States is that the clause of section 6, act of 1862, still has vitality and remains unrepealed, and is not suspended nor rendered inoperative by action of law.

Against this view several grounds of defense are assumed, either that the act of 1862 presumably by its language precluded an action at law or in equity to recover the 5 per cent. of net earnings, or that subsequent legislation repealed or suspended or subordinated the 5 per cent. clause.

First. Can the United States recover, if at all, in the present suit?

The section under discussion provides two sources for present or stated reimbursements for bonds issued or interest paid by the United States on behalf of the company, viz, the retention in the Treasury of one-half of the compensation due for services performed in carrying mails, troops, &c., and the payment annually of 5 per cent. of the company's net earnings. Since the decision of the court in The United States *vs.* Union Pacific Railroad (91 U. S. Rep., 72), the company has the right to recover by a suit at law against the United States in the Court of Claims the other one-half of the compensation. The Secretary of the Treasury in that case had withheld the whole compensation from the Union Pacific Company. In the case now before the court, the company has refused to pay to the United States 5 per cent. of its annual net earnings since its completion.

When an action is brought by the United States to recover it, it is urged by the company that the United States cannot recover, because the Secretary must state an account (section 236, Rev. Stat.) from certain data to be furnished by the company in accordance with section 20, act of 1862, and then, on failure to pay the amount stated, the Secretary shall take possession of the road.

There can be no obvious reason why the company should recover through judicial proceedings moneys withheld by the United States which it is entitled to under the act of July 1, 1862, section 6, and the United States should not have the same privilege in default of payment by the company of its annual indebtedness provided for by the same section. The right of the United States to demand 5 per cent. of net earnings is identical with that of the company against the United States for pay for services rendered.

There is no authority for the Secretary of the Treasury to take possession of the road on the failure to pay the 5 per cent., as has been contended. The forfeiture clause of section 5, act of 1862, refers exclusively to a failure of the company to pay or redeem said bonds or any part of them when required to do so by the Secretary of the Treasury. As the law provides that the bonds are payable at maturity, the company could not be required to redeem them beforehand, and the forfeiture could only refer to a failure to redeem at maturity.

It would be straining the language used beyond sound reason to assert that this annual payment of 5 per cent. could not be enforced until the cause for its enforcement had ceased to exist. When the bonds mature, the annual payments towards their liquidation are discontinued. Whatever part of the bonds remains unpaid must then be paid. Proceedings to be instituted in case of default would be for forfeiture or to recover for the whole amount loaned and unpaid. The greater, *i. e.*, the bonds and interest, would include the less, *i. e.*, the annual payment of 5 per cent. The 5 per cent. of net earnings at any rate is not a bond or a part of a bond, but a pro-

vision of law for an annual payment to the United States towards the liquidation of a loan of money. As the business of the company is prosperous, or shows net earnings, the United States derive a present benefit. The annual application of the 5 per cent. to a certain extent protects the interests and lien of the United States against future improvidence or irregular manipulations as the time for the maturity of the bonds approaches. It is a charge on the stockholders as long as they have possession, and ceases with their tenure. If the United States cannot sue to recover the 5 per cent., there is no provision of law to enforce its annual payment. The natural conclusion arising from a denial by the company that the 5 per cent. can be sued for, is that the Secretary of the Treasury shall adjust the annual indebtedness of the company to the United States in the manner and by the method which to him may seem most proper. This plan might be advantageous to the United States, but the interests of the company would scarcely be as well protected as when it is able to demand a judicial determination of any differences which might arise in construing the statutes or applying the law.

The obligation to pay the 5 per cent. having been disregarded by the company, suit at law could be brought in the circuit court of the United States by virtue of section 629, subdivision third (Rev. Stat., 2d ed., p. 111), which provides, "The circuit courts shall have original jurisdiction as follows: Third, of all suits at common law where the United States or any officer thereof suing under the authority of any act of Congress are plaintiffs."

By the act of March 3, 1873 (17 Stat., 508), a counter

suit could be brought by the United States for the 5 per cent., where a suit for compensation for services rendered to the United States is begun in the Court of Claims.

By the act of June 22, 1874 (18 Stat., 200), provision is made for the institution of suits to collect the 5 per cent. on the refusal to pay after demand. As the Kansas company refused to pay the 5 per cent. when demand was made, an action at law was begun in the circuit court to recover the amount claimed. Here, then, is found both general and special jurisdiction to enforce such obligations and covenants as have been broken and disregarded by one party to the agreement.

Reference has been made to the provisions of section 236, Rev. Stat., which are, "All claims and demands whatever by the United States or against them, and all accounts whatever in which the United States are concerned, either as debtors or as creditors, shall be settled and adjusted in the Department of the Treasury."

This section has no application whatever to a litigated claim or demand, but is a general provision that all accounts and claims which are the subject of adjustment and settlement, other than by a court, must be settled and adjusted by the Treasury Department, and not by the Interior or other department of the government. It is a statute of departmental jurisdiction which bears no relation *per se* to the judicial system of the United States.

This court decided in Clyde's case (13 Wallace, 35) that the Court of Claims cannot restrict its own jurisdiction by its own rules. A rule which requires the petition to show that a claim "ordinarily settled in any ex-

ecutive department" has been submitted to that department "for its allowance," "without success," is not a rule of practice, but an additional restriction upon the jurisdiction of the court. The jurisdiction is established by statute, which only requires that a party shall have a claim, not that the claim shall first go through an executive department.

The application of this ruling to the present case is that the general and special acts of jurisdiction before quoted are not limited or affected by section 236, Rev. Stat., which refers to an entirely different manner of presenting claims and demands; and that these acts only require the United States to have a claim for the 5 per cent., and not that the claim shall first go through the executive department.

But that the United States has a claim under section 6, act of 1862, for 5 per cent. of net earnings, if unaffected by subsequent legislation, there can be no question.

The right to apply the 5 per cent. of net earning necessarily implies the right to recover the same, in the manner and by means of the process applicable to other claims and demands. The agreement provides that 5 per cent. of the company's net earnings shall be annually applied to the bonds. There has been no such application by the company, and there can be no sufficient reason why the right to the 5 per cent. cannot be enforced as any other condition in the acts.

III.

Did section 10, act of 1864 (13 Stat., 356), repeal or in any way affect the provision of section 6, act 1862, for the

payment to the United States of 5 per cent. of the road's annual net earnings?

The tenth section of the act of 1864 provides that "the Union Pacific Railroad Company can issue first-mortgage bonds on their respective railroads and telegraph lines to an amount not exceeding the amount of the bonds of the United States, and of even tenor and date, time of maturity and character of interest, with the bonds authorized to be issued to the said railroad companies respectively, and a lien of the United States bonds shall be subordinate to that of the bonds of any or either of said companies hereby authorized to be issued on their respective roads, property, and equipments, except as to the provisions of the sixth section of the act to which this act is an amendment, relating to the transmission of dispatches and the transportation of mails, troops, munitions of war, supplies, and public stores for the Government of the United States." This section only subordinates one lien to another—the lien of the subsidy-bonds to that of the first-mortgage bonds.

This subordination is itself modified by the exception as to the provisions of the sixth section of the act of 1862, as to the transmission of dispatches, mails, &c.; *i. e.*, the vital purposes of the road. If first mortgage bondholders take possession of the road on foreclosure, these duties would have to be performed by them.

The exception of the tenth section was only to the provisions of the mortgage, and is limited thereto.

The provision as to 5 per cent. in the sixth section of the act of 1862 is distinct and independent from the mortgage. Indeed, it is a provision *pro tanto* for repayment of the subsidy bonds. That provision was simply a naked legal obligation, dependent for its fulfillment

on the existence of net earnings. It is a duty resting upon the stockholders as long as they hold the road, and a distinct and independent duty to be performed by them. The superiority given to the first mortgage affects it in no way, and the provision for paying the 5 per cent. still remains.

As between the United States and the company, while it remains in possession of the road, no change is effected in its contract. It is only when the first mortgage bondholders come into possession of the road that they would be entitled to devote all the avails to the payment of their mortgage.

If the provision to pay 5 per cent. of net earnings forms part of the mortgage contract, the same result follows. The company, as represented by its stockholders, in that case should pay the second mortgagees the 5 per cent. out of the net earnings as long as it was in possession.

As an illustration, $5,000 is borrowed, for which a mortgage is given on a block of five stores, one of the conditions of which is that the rental of one of the stores should be applied to the payment of the interest of the mortgage. A second mortgage on the same stores is negotiated, with the agreement that it should be the first lien. The obligation or condition to pay the rental of the onestore to the first (now second) mortgagee remains in force as long as the mortgagor remains in possession. It is not affected by the priority of liens, and remains a charge to the owner, and the first mortgagee has no control over its disbursement as long as his mortgage interest is paid.

In the discussion of the question whether the United States were entitled to receive payment from the Union

Pacific Company of the interest on the bonds as it was advanced by them, it was treated in argument in the Court of Claims and the Supreme Court, and in the opinion of each court, that there were two sources in existence for the reimbursement of the indebtedness to the United States previous to the maturity of the bonds, viz, one half of the transportation money and 5 per cent. of net earnings. Union Pacific Railroad Company *vs.* United States, 10 Court of Claims, p. 557, Mr. Stoughton's Argument, p. 581; Nott, J., opinion. 91 U. S., pp. 85, 95, Davis, J., opinion.

IV.

Under the act of 1862, the Kansas Pacific Company was authorized to build a road from Kansas City to the initial point on the one hundredth meridian, a distance of, say, 394 miles, for which purpose the organic act granted in aid, among other things, a roadway on public lands 400 feet wide, a further donation in alternate sections of 12,800 acres of land per mile for the entire distance (worth at the minimum price $16,000 per mile), and a loan of thirty year bonds to the amount of $16,000 per mile, also for the entire distance.

These bonds constituted by the act a first mortgage (subsequently modified) on the whole line, with its stock, fixtures, and property of every kind, all of which, including every right, function, immunity, and appurtenance, was forfeitable for default in redeeming any part of the bonds.

The indebtedness by reason of this loan was to be reduced by application thereto of all compensation (afterward one-half) for transportation required by the

United States and not less than 5 per cent. of the net earnings.

By section 9 of the act of 1864, the restriction of the route to a connection at the initial point was removed, and connection with the trunk west thereof permitted, "in case such company shall deem such westward connection more practicable or desirable."

The Kansas company took advantage of this provision, and in course of time adopted its present route, departing therein widely from that originally contemplated, and traversing a distance of, say, 745 miles, or about 351 miles more than as first proposed. This is including the part (106 miles) operated by the Denver Pacific Company.

But the United States, while giving this privilege of deviation, carefully prescribed the relations of the parties and the limits of their aid toward the part in deviation, by providing in the same section that as to such part the "company shall be *entitled to all the benefits* and be *subject to all the conditions and restrictions* of this act," but should receive no additional bonds or sections of public land.

In case, therefore, of such departure from the established route, the company so electing was notified that "all the conditions and restrictions of the act" would attach to the part in deviation, and but a part only of the "benefits."

"The conditions and restrictions of the act" referred to are (so far as concerns the present controversy) contained in section 6, 1862, and especially in this, that the company should transport the mails, troops, &c., *upon its railroad* on condition that all compensation therefor (reduced to one-half in section 5, 1864), together with 5 per

cent. of the net earnings, should be applied to the payment of said bonds and interest until fully paid.

The amendatory act of July 3, 1866 (14 Stat., 79), authorizes and confirms the then proposed departure of the Kansas company, limiting, however, the point of connection with the Union Pacific, and repeating the limitation on the issue of bonds, but not that as to the grant of alternate sections. The omission of the limitation as to the grant of lands, and the provision inserted, that "upon the filing of the said map showing the general route of said road, the lands along the entire line thereof, so far as the same may be designated, shall be reserved from sale by order of the Secretary of the Interior," established a land-grant co-extensive with the length of the line.

The United States then had given the Kansas Company the franchise of a railway and telegraph line from Kansas City, on the Missouri, via Denver, Colo., to a point of connection with the Union Pacific at some point not more than 50 miles west of the meridian of Denver, with a roadway 400 feet wide over the public lands all the way, a land-grant of 12,800 acres per mile all the way, a loan of $6,303,000, in thirty-year bonds, the semi-annual interest on which the United States were bound to keep paid up, and the right to raise as much more on the granted property and franchise by mortgage, to which (with certain exceptions) the lien of the United States "on the whole line of the railroad and telegraph, together with the rolling-stock, fixtures, and property of every kind and dereription, and in consideration of which said bonds may be issued," was made subordinate.

In return the Kansas Company had agreed and was bound to operate the entire line in conformity with the

prescribed conditions, which had been reserved, moreover, from the effect of the transposition of the government lien on the road, and were therefore bound to apply the compensation for mail-service on the whole line to reduction of the bonded debt to the defendants.

The position of the Kansas Company is that the lien of the United States to its road for the loan of $6,303,000 was confined to that part of the line extending 394 miles from Kansas City, on the completion of which in sections the bonds were issued.

This position seems in direct contradiction to the statute heretofore cited, section 5, 1862, and no amount of argument can make the case plainer than the legislative words, "shall ipso facto constitute a mortgage on the whole line," &c.

But it is urged that the last phrase of the clause just mentioned, namely, "and in consideration of which said bonds may be issued," supports in some way the limitation claimed.

To this it may be answered, first, that the consideration for issuing the bonds must needs be something done or conceded by the company for the benefit of the United States, and the act or concession contemplated was probably the submission of all the company property to the lien as prescribed. But, secondly, supposing that this phrase relates to the extent of the lien, it clearly included the entire line and property of the Kansas Company at the time of enactment, and if the company thereafter chose to extend its line and accept additional grants therefor, it took these grants with the conditions annexed by the act, and among these was the condition which made the whole line and its earnings subject to the reduction and discharge of the government lien.

The railroad upon which bonds were to be issued extended, in 1866, to Denver, Colo., and in a northwardly direction to Cheyenne, Wyo., connecting at this point with the Union Pacific Railroad. Bonds of the United States were issued, after the act of 1864 and act of 1866, to the Kansas company. The Kansas company accepted the rights and privileges of the acts of 1866, designating the route and filing the map in conformity to the law, and promised to build a road westwardly of Kansas City.

The construction put on the words "and in consideration," &c., by the company, is further shown to be incorrect, from the circumstance that all the railroads that were contemplated by this act were subsidized their entire length, and that therefore the bonds were issued in consideration of whatever roads were authorized by the act of 1862. When the Kansas road was subsequently extended by act of 1864, section 9, and act July 3, 1866, section 1, the obligation of the mortgage still extended over the whole line of railroad, and its extension was dependent upon the conditions that all the obligations, including the lien of the government mortgage, should cover the whole line of road contemplated by these acts.

A further proof that the lien of the government was upon the whole line of the road is furnished by the last clause of section 5, which provides that the Secretary of the Treasury shall take possession of the road, on the failure to redeem the bonds, as it shall exist in the year 1900, at which date the Supreme Court have decided in the case of the Union Pacific Railroad *vs.* the United States, 1 Otto, 72, that the bonds and interest will become payable. It was the road that would be then existing in 1900, and whatever road was authorized to be built under the acts which was subject to forfeiture and fore-

closure in case of default to redeem the bonds, and this road that was so authorized could be followed in all its parts, whoever had possession of it, however divided in ownership as between third parties—the privity, however, only existing between the government and the Kansas Pacific Railroad.

That the railroad that was to be mortgaged was not confined to the three hundred and ninety-fourth milepost is further shown by the provision of the act of 1864, section 9, which provides, as has been seen, for the building of the road west of the one hundredth meridian, but only subject to the conditions and restrictions of the acts relating to the Pacific Railroad.

Section 10 of the act of 1864 authorizes the Union Pacific, the Central Pacific, and any other company within these acts, to issue their first-mortgage bonds on their respective railroads and telegraph-lines. The preceding section having authorized the building of a railroad by the Kansas Company west of the one hundredth meridian, the railroad in that case upon which first-mortgage bonds could be issued was the road contemplated by that section.

In the consideration of the questions arising under the Pacific Railroad acts, the defendants have taken the acts as forming one act; and it is urged that the acts of 1862, 1864, and 1866 are, within the contemplation of law, one act, and are to be construed together as far as the intention of Congress is to be determined in the authorization of the construction of a railroad in Kansas.

The construction placed upon the acts as to the effect of the government lien on the railroad of the Kansas company is fortified by the case of Galveston Railroad *vs.* Cowdrey, 11 Wall., 459 and 480. This case decided

that the first mortgage and all the mortgages took precedence from the date of the issue, without regard to the existence of property at the time of the issuance: but the road that was within contemplation at the time of their issuing, although unbuilt, was subject to their lien.

V.

But conceding that the lien of the bonds is confined to three hundred and ninety four miles of the Kansas Company's road, the effect would not be as claimed, for we contend the liability of the claimant may and does rest on other grounds.

Section 6, 1862, declares that the *grants* aforesaid are made upon condition that said company shall pay said bonds at maturity, and at all times transport mails upon said railroad, and apply the compensation as prescribed. The "*grants*" include much more than the bond-loan, and the obligations to pay the bonds and to transport the mails under the prescribed condition as to compensation rests as much on the grant of way or the land-grant as on the loan. How, then, can a company which took these grants for the entire route claim that any part of its line is not subject to the said and every other condition? How, indeed, can it be maintained that the said obligations do not pertain to that part of its line in controversy, when the object of the act was to enable the company to obtain the grants which are charged with these obligations, and which have never been conceded without annexing them?

Again, under section 6, act of 1862, the company was bound to keep the railroad in repair and use, and transport mails, troops, munitions of war, &c., upon said railroad for the government; and it is admitted by the

claimant that this obligation refers to the whole line of road, and that the services to be rendered were over the whole line of railroad without reference to the extent of government lien. It naturally follows that the compensation for services rendered refers to the services rendered on the whole line of road; in this case, from Kansas City to Denver and northward to the Union Pacific Railraad, the same railroad that is referred to in the first part of the section, that railroad being whatever road was built or to be built by the Kansas company from Kansas City to Denver and westwardly to the Union Pacific Railroad.

VI.

What constitute "net earnings" within the meaning of the sixth section, act of 1862, and had the road any such during the period covered by the petition?

The term "net earnings" in the acts constituting the charter of the railroad company is found only in sections 6 and 18, act of 1862. In the sixth section, the clause now the subject of controversy, is as follows: "And after said road is completed, until said bonds and interest are paid, at least five per centum of the *net earnings* of said road shall also be annually applied to the payment thereof." Section 18 provides "That whenever it appears that the *net earnings* of the entire road and telegraph, including the amount allowed for services rendered for the United States, after deducting all expenditures, including repairs, and the furnishing, running, and managing of said road, shall exceed ten per centum upon its cost (exclusive of the *five per centum* to be paid to the United States), Congress may reduce the rates of fare thereon, if unreasonable in amount, and may fix and establish the same by law."

The United States contend that the words "net earnings," in the sixth section of the act of 1862, were used in the sense in which they were then used in ordinary acceptation, or as technical in regard to railroads, as meaning the gross earnings of a railroad in its capacity as a carrier and instrument for carrying, less the expenses of acquiring those earnings, including in these expenses the cost of keeping the road and its equipment good. Repairs, in kind, of existing structures, taxes, services, supplies, are to be included; payment for construction, interest for debts, &c., to be excluded. Gross earnings, less legitimate expenses, of the kind above enumerated.

From general knowledge and publication respecting railroads, such as Poor's Manual, the official reports of railroads in Massachusetts, and the reports of the leading railroads in New York, Pennsylvania, and the West, it is fairly to be contended that such use obtains.

In the case of the two railroads of equal length, properly constructed and equipped in the same manner, and at the same cost, and both in the same state of repair, both doing a profitable business of the same kind and amount, and at the same cost, the construction and equipment of the one having been paid for in cash derived from full paid subscriptions to the capital stock, and those of the other being paid for in cash realized from loans secured by mortgage of the road and its equipment, there would be no difference in the net earnings of the two corporations because of the different manner in which the money was obtained with which the cost of their construction and equipment was paid.

The exact definition of net earnings, in railroad parlance, is given by Judge Blatchford, in the case of St.

John *vs.* The Erie Railway Company, 10th Blatchford's Reports, 271, 279:

"Net earnings are, properly, the gross receipts, less the expenses of operating the road to earn such receipts. Interest on debts is paid out of what thus remains, that is, out of the net earnings. Many other liabilities are paid out of the net earnings. When all liabilities are paid, either out of the gross receipts or out of the net earnings, the remainder is the profit of the shareholders to go towards dividends, which, in that way, are paid out of the net earnings. That this is the meaning of the expression 'net earnings,' in the contract, is shown by the fact that the contract states that the trustees are to received the net earnings, and out of them to pay the floating debt, and the delayed coupons, and by the further fact that the contract, the statute, and the certificates state that the mortgage interest is to be paid out of the net earnings, by stating that the preferred dividends are to be paid out of the net earnings 'after payment' (that is, out of the net earnings) 'of mortgage interest.'"

The case was heard on appeal in the Supreme Court, and the court (22 Wallace, p. 136) sustained the decision of Judge Blatchford. There is nothing in the opinion of Justice Swayne that stands in the way of the view taken by the United States as to the meaning of the term "net earnings," as the Supreme Court did not determine the meaning of "net earnings," but merely gave a definition of the word "net." The definition of "net earnings" given by Judge Blatchford in the case below was not overruled or controlled by the opinion of the Supreme Court. Indeed, in the view taken by the Supreme Court of the contract which was to be construed, the question

of what constituted "net earnings" did not become material. The facts of this case show the use of the term "net earnings" in legislation and agreements respecting railroads in 1859, and are briefly these:

The corporation called the New York and Erie Railway Company had several classes of debts secured by mortgage on its road; it also had bonds not thus secured to a large amount. The road became bankrupt, and the shareholders and creditors of the company by an amicable agreement which was sanctioned by the statute organizing a new corporation under the name of the Erie Railway Company, provided that the mortgage debt of the old company should have the first lien under the new corporation, and the capital stock thereof should be divided into common capital stock and preferred capital stock; the preferred capital stock was to be equal to the amount of the unsecured and judgment debts of the old corporation, and the common stock was to be issued for the capital stock of the old corporation; and in the agreement it was provided that "such preferred stock was to be entitled to preferred dividends out of the net earnings, not to exceed 7 per cent. in any one year, payable semi-annually, after payment of mortgage interest and delayed coupons in full."

Mr. Justice Swayne, in giving the opinion of the court, on page 147, says: "The maximum payable in the preferred stock was specified. It might be less, or nothing. It could not be more. The amount subject to the limit prescribed depended wholly upon the residue of the net earnings applicable in that way." From which it is clear that the interest of the mortgage debt was to be paid from the net earnings, and the residue of the net earnings spoken of by the court was that portion of the net

earnings that remained after the interest of the mortgage debt had been paid therefrom.

The lexical definition of "net," as given by Webster, and adopted by Justice Swayne in St. John *vs.* The Erie Railway Company, is "clear of all charges and deductions." Worcester: "That which remains after deduction of all charges or outlay, as 'net profits,' clear of all tare or tret, or other deductions, as 'net weight.'" The word "net" means "clear"—clear of charges and deductions, and the charges and deductions that are to be cleared depend upon the subject to which the word net is applied. Thus the charges and deductions to be deducted from gross weight to make net weight are different from the charges and deductions from gross earnings to make net earnings, or from gross income to make net income, or from gross profits to make net profits. As to earnings, Worcester gives as the definition: "That which is earned; wages; reward of labor." As the words "income" and "profit" have been used in the record, and in argument by the company, as synonymous words to earnings, the lexical definition of them will be of service to show that they are not synonymous. Worcester says: "Income: gain derived from any business or property; produce; profit; revenue." "Profit: the amount of money obtained from the sale of commodities above the cost of purchase or production: pecuniary gain; emolument." The "earnings" of a road had acquired in 1862 a specific meaning; its earnings as a common carrier from the transportation of persons and goods. "Net earnings" is the sum remaining after deducting from the earnings such expenditures as were necessary to obtain the earnings—to earn that which is earned. Debts are to be paid out of such net earnings.

The habitual and general use of the term is the same, as has been shown in the case of St. John *vs.* The Erie Railway Company (10 Blatchford, 271–279).

In Eyster *vs.* The Centennial Board of Finance, 94 Sup. Ct. Reports, p. 500, while the word "earnings" was not under discussion, the principle which the United States now contend for was recognized. It was said that under the acts of Congress (June 1, 1872, 17 Stat., 203, and February 16, 1876, 19 Stat., 3) the word "profits" must be held to be synonymous with receipts, and that the receipts of the exhibition over and above its current expenses were the profits. They are in fact the net receipts, which, according to the common understanding, ordinarily represent the profits of a business. (Page 503.)

In the eighteenth section, the explanation of what were net earnings, or how they were to be reached, is in harmony with the view of the United States, heretofore stated. The whole section may be construed in various forms, but all having the same meaning; first, that whenever the net earnings of the entire road and telegraph line, including the amount allowed for services rendered for the United States, shall exceed 10 per cent. upon the cost of the road in addition to the 5 per cent. on net earnings to be paid in, as provided in 6th section, that Congress may reduce rates of fare, &c.; or, second, when net earnings, less 5 per cent. thereon to be paid to the United States, shall exceed 10 per cent. on cost of road, Congress may reduce, &c.; or, third, when net earnings of the entire railroad, &c., which are reached by deducting from the gross earnings, which shall include the amount allowed for services rendered for the United States, all expenditures,

which include repairs and the furnishing, running, and managing of said road, shall exceed 10 per cent. upon the cost of the road (first deducting from the net earnings the 5 per cent. to be paid to the United States), Congress may reduce, &c. It is of no importance whatever whether 100 per cent. or 95 per cent. of net earnings is to exceed 10 per cent. of the cost of the road.

If it be argued that the words "net earnings" as used in section 18, act of 1862, are to be construed as earnings applicable to dividends (whether divided or not), the reply is, that the object of the section is not, after allowing earnings for the purpose of dividends, viz, 10 per cent., to enable government to reduce the tolls, but its object is, after net earnings have been received equal in amount to 10 per cent. *upon the cost of the road*, to invest the government with this power.

While it is not considered that any different meaning can be given to the term "net earnings" as used in section 18 than when it is used in section 6, yet a rule might well be made more favorable to the company, in the former section, as it was the condition upon which the high power of reducing its tolls was to be exercised.

No interest was to be deducted within the meaning of the eighteenth section, for the act of 1862 did not contemplate any interest to be paid, as the first mortgage bonds were issued on the authority of the tenth section, act of 1864, and the interest on subsidy bonds was not to be paid until the maturity of the bonds.

The attention of the court is called to the opinion of Drake, Chief Justice, in the case of the Union Pacific Railroad Company *vs.* The United States, decided in June, 1878, December Term, 1877, Court of Claims, to be found in the transcript of record No. 736, of the pres-

ent term of the Supreme Court. The views now contended for by the United States on the question of net earnings are sustained by the Court of Claims in discussing the last clause of section 6, act of July 1, 1862.

EXPENSES

Operating expenses are conceded to be a proper charge. The items, "operating expenses," "discount, interest, and exchange," "insurance," "State, county, and city taxes," "federal taxes," "profit and loss," "pooled earnings on road 106 miles east of Denver," are not contested. The items, "depreciation account, or expenses not charged up," "construction account," "equipment account," "real estate purchased for depots," "expenses land department," "interest on funded debt," "50 per cent. government earnings withheld," should not properly be charged to the expense account to reach net earnings.

The "depreciation account, or expenses not charged up," is explained by the finding to be an account which "contemplates the retention of part of the gross earnings of each year in hand as a reserve fund to replace the depreciation, or wear and tear, at a future time, but such reserve fund has no existence in cash or assets, and it is not the practice of railroads to keep such a reserve." The finding sustains the objection. No such account is contemplated by railroad companies, and of necessity is rendered useless by the expenses paid at hand—operating expenses, in repairing the road and equipments.

The "construction account, or improvements and additions to track, construction of side tracks, switches, bridges, &c., and right of way purchased," does not

belong to the expense account. In the practical working of all railroad companies, the cost of all improvements that add value and increased stability to the property of the company over the original value and stability are properly chargeable to "construction." Whether these expenditures ultimately add to the net earnings, of which the United States are entitled to 5 per cent., is not to be considered. The method by which net earnings are arrived at must be founded upon some principle the result of practical experience and scientific knowledge, and the gain or loss to the United States or the company is an incident to its application, and not the principle itself.

The same remarks apply to "equipment" and "real estate."

"Expenses land department" obviously are excluded from the legitimate expense account so far as concerns net earnings. They have no connection with the business of the road as a common carrier, and bear no relation to the capacity of the road to make earnings. Earnings are made without such expenditures.

"Interest on funded debt." The proposition to deduct these items from the gross earnings assumes that the net earnings of the property of the railroad company are the same as the net income of the owners of the property. What net earnings are has already been discussed. From them is paid the interest on various classes of security; the holders of bonds first as creditors, and the stockholders next as debtors and owners of the property. Earnings clear of all expenses necessary to earn them are net earnings. The example given on page of this brief shows the application.

"Fifty per cent. government earnings withheld" is a

debt of the company. The fact that the United States withhold the amounts and credit them to the subsidy bonds issued as payments in account (sec. 6, act July 1, 1862; sec. 5, act July 2, 1864,) gives them no different character from other debts owned by the company. A debt, or any part of it, cannot be chargeable to earnings as a means of obtaining those earnings, as it has nothing to do with the road in its capacity as earner of freight money.

EARNINGS.

The only item that does not properly belong to earnings is the sums received from sales of real estate. The same principle, which excludes the sums expended in the purchase of real estate from the expenses attending the operation of the road, would with equal force deprive the earnings-account of the money resulting from the sale of real estate.

CHARLES DEVENS,
Attorney-General.
JOS. K. McCAMMON.

ACTS OF CONGRESS

RELATING TO

THE PACIFIC RAILROADS.

WASHINGTON:
GOVERNMENT PRINTING OFFICE.
1878.

ACTS OF CONGRESS

RELATING TO

THE PACIFIC RAILROADS.

WASHINGTON:
GOVERNMENT PRINTING OFFICE.
1878.

CONTENTS.

	Page
Act of July 1, 1862	5
Amendment of July 12, 1862	20
Amendment of July 2, 1864	21
Amendment of March 3, 1865	37
Amendment of July 3, 1866	38
An act relating to the Denver Pacific, March 3, 1869	39
Joint Resolution, April 10, 1869	41
Act of March 3, 1871	42
Act of March 3, 1873	43
Act of June 20, 1874	45
Act of June 22, 1874	46

PACIFIC RAILROAD ACTS.

ACT OF 1862.

AN ACT to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the government the use of the same for postal, military, and other purposes, approved July 1, 1862. 12 Stat., 489.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That Walter S. Burgess, William P. Blodgett, Benjamin H. Cheever, Charles Fosdick Fletcher, of Rhode Island; Augustus Brewster, Henry P. Haven, Cornelius S. Bushnell, Henry Hammond, of Connecticut; Isaac Sherman, Dean Richmond, Royal Phelps, William H. Ferry, Henry A. Paddock, Lewis J. Stancliff, Charles A. Secor, Samuel R. Campbell, Alfred E. Tilton, John Anderson, Azariah Boody, John S. Kennedy, H. Carver, Joseph Field, Benjamin F. Camp, Orville W. Childs, Alexander J. Bergen, Ben. Holliday, D. N. Barney, S. De Witt Bloodgood, William H. Grant, Thos. W. Olcott, Samuel B. Ruggles, James B. Wilson, of New York; Ephraim Marsh, Charles M. Harker, of New Jersey; John Edgar Thomson, Benjamin Haywood, Joseph H. Scranton, Joseph Harrison, George W. Cass, John H. Bryant, Daniel J. Morrell, Thomas M. Howe, William F. Johnson, Robert Finney, John A. Green, E. R. Myre, Charles F. Wells, jr., of Pennsylvania; Noah L. Wilson, Amasa Stone, William H. Clement, S. S. L'Hommedieu, John Brough, William Dennison, Jacob Blickinsderfer, of Ohio; William M. McPherson, R. W. Wells, Willard P. Hall, Armstrong Beatty, John Corby, of Missouri; S. J. Hensley, Peter Donahue, C. P. Huntington, T. D. Judah, James Bailey, James T. Ryan, Charles Hosmer, Charles Marsh, D. O. Mills, Samuel Bell, Louis McLane, George W. Mowe, Charles McLaughlin, Timothy Dame, John R. Robinson, of California: John Atchison and John D. Winters, of the territory of Nevada; John D. Campbell, R. N. Rice, Charles A. Trowbridge, and Ransom Gardner, Charles W. Penny, Charles T. Gorham, William McConnell, of Michigan: William F. Coolbaugh, Lucius H. Langworthy, Hugh T. Reid, Hoyt Sherman, Lyman Cook,

Samuel R. Curtis, Lewis A. Thomas, Platt Smith, of Iowa; William B. Ogden, Charles G. Hammond, Henry Farnum, Amos C. Babcock, W. Seldon Gale, Nehemiah Bushnell, and Lorenzo Bull, of Illinois; William H. Swift, Samuel T. Dana, John Bertram, Franklin S. Stevens, Edward R. Tinker, of Massachusetts; Franklin Gorin, Laban J. Bradford, and John T. Levis, of Kentucky; James Dunning, John M. Wood, Edwin Noyes, Joseph Eaton, of Maine; Henry H. Baxter, George W. Collamer, Henry Keyes, Thomas H. Canfield, of Vermont; William S. Ladd, A. M. Berry, Benjamin F. Harding, of Oregon; William Bunn, Jr., John Catlin, Levi Sterling, John Thompson, Elihu L. Phillips, Walter D. McIndoe, T. B. Stoddard, E. H. Brodhead, A. H. Virgin, of Wisconsin; Charles Paine, Thomas A. Morris, David C. Branham, Samuel Hanna, Jonas Votaw, Jesse L. Williams, Isaac C. Elston, of Indiana; Thomas Swan, Chauncey Brooks, Edward Wilkins, of Maryland; Francis R. E. Cornell, David Blakely, A. D. Seward, Henry A. Swift, Dwight Woodbury, John McKusick, John R. Jones, of Minnesota; Joseph A. Gilmore, Charles W. Woodman, of New Hampshire; W. H. Grimes, J. C. Stone, Chester Thomas, John Kerr, Werter R. Davis, Luther C. Challis, Josiah Miller, of Kansas; Gilbert C. Monell, and Augustus Kountz, T. M. Marquette, William H. Taylor, Alvin Saunders, of Nebraska; John Evans, of Colorado; together with five commissioners to be appointed by the Secretary of the Interior, and all persons who shall or may be associated with them, and their successors, are hereby created and erected into a body corporate and politic, in deed and in law, by the

Name and title.

name, style, and title of "The Union Pacific Railroad Company;" and by that name shall have perpetual succession, and shall be able to sue and to be sued, plead and be impleaded, defend and be defended, in all courts of law and equity within the United States, and may make and have a common seal; and the said corporation is hereby authorized and empowered to lay out, locate, construct, furnish, maintain, and enjoy a continuous railroad and telegraph,

Location, &c.

with the appurtenances, from a point on the one hundredth meridian of longitude west from Greenwich, between the south margin of the valley of the Republican river and the north margin of the valley of the Platte river, in the territory of Nebraska, to the western boundary of Nevada territory, upon the route and terms hereinafter provided, and is hereby vested with all the powers, privileges, and immunities necessary to carry into effect the purposes of this act

as herein set forth. The capital stock of said company shall consist of one hundred thousand shares of one thousand dollars each, which shall be subscribed for and held in not more than two hundred shares by any one person, and shall be transferable in such manner as the by-laws of said corporation shall provide. The persons hereinbefore named, together with those to be appointed by the Secretary of the Interior, are hereby constituted and appointed commissioners, and such body shall be called the Board of Commissioners of the Union Pacific Railroad and Telegraph Company, and twenty-five shall constitute a quorum for the transaction of business. The first meeting of said board shall be held at Chicago, at such time as the commissioners from Illinois herein named shall appoint, not more than three nor less than one month after the passage of this act, notice of which shall be given by them to the other commissioners by depositing a call thereof in the post-office at Chicago, post paid, to their address, at least forty days before said meeting, and also by publishing said notice in one daily newspaper in each of the cities of Chicago and St. Louis. Said board shall organize by the choice from its number of a president, secretary, and treasurer, and they shall require from said treasurer such bonds as may be deemed proper, and may from time to time increase the amount thereof as they may deem proper. It shall be the duty of said board of commissioners to open books, or cause books to be opened, at such times and in such principal cities in the United States as they or a quorum of them shall determine, to receive subscriptions to the capital stock of said corporation and a cash payment of ten per centum on all subscriptions, and to receipt therefor. So soon as two thousand shares shall be in good faith subscribed for, and ten dollars per share actually paid into the treasury of the company, the said president and secretary of said board of commissioners shall appoint a time and place for the first meeting of the subscribers to the stock of said company, and shall give notice thereof in at least one newspaper in each State in which subscription books have been opened, at least thirty days previous to the day of meeting; and such subscribers as shall attend the meeting so called, either in person or by proxy, shall then and there elect by ballot not less than thirteen directors for said corporation; and in such election each share of said capital shall entitle the owner thereof to one vote. The president and secretary of the board of commissioners shall act as inspectors of said election, and shall certify under their hands the names of the directors elected at said meeting; and the

Amt. and number of shares of stock altered in sec. 1, act 1864.

Comm'rs, how appointed and to hold meeting.

Treasurer to give bonds, &c.

Books to be kept open. See sec. 2, 1864.

Comm'rs to call meeting of stockholders.

To elect directors. See sec. 13, act of 1864.

Books and property to be delivered to directors.

said commissioners, treasurer, and secretary shall then deliver over to said directors all the properties, subscription-books, and other books in their possession, and thereupon the duties of said commissioners and the officers previously appointed by them shall cease and determine forever, and thereafter the stockholders shall constitute said body politic and corporate. At the time of the first and each triennial election of directors by the stockholders, two additional directors shall be appointed by the President of the United States, who shall act with the body of directors, and to be denominated directors on the part of the government. Any vacancy happening in the government directors at any time may be filled by the President of the United States. The directors to be appointed by the President shall not be stockholders in the Union Pacific Railroad Company. The directors so chosen shall, as soon as may be after their election, elect from their own number a president and vice-president, and shall also elect a treasurer and secretary. No person shall be a director in said company unless he shall be a bona fide owner of at least five shares of stock in the said company, except the two directors to be appointed by the President, as aforesaid. Said company, at any regular meeting of the stockholders called for that purpose, shall have power to make by-laws, rules, and regulations, as they shall deem needful and proper, touching the disposition of the stock, property, estate, and effects of the company, not inconsistent herewith, the transfer of shares, the term of office, duties, and conduct of their officers and servants, and all matters whatsoever which may appertain to the concerns of said company; and the said board of directors shall have power to appoint such engineers, agents, and subordinates as may from time to time be necessary to carry into effect the object of this act, and to do all acts and things touching the location and construction of said road and telegraph. Said directors may require payment of subscriptions to the capital stock after due notice, at such times and in such proportions as they shall deem necessary to complete the railroad and telegraph within the time in this act prescribed. Said president, vice-president, and directors shall hold their office for three years, and until their successors are duly elected and qualified, or for such less time as the by-laws of the corporation may prescribe; and a majority of said directors shall constitute a quorum for the transaction of business. The secretary and treasurer shall give such bonds, with such security, as the said board shall from time to time require, and shall hold their offices at the will and pleasure of the direct-

Two directors to be appointed by the President of the U. S.

By act of 1864 altered to five. See sec. 13, 1864.

Amended by sec. 1, 1864.

Company to make by-laws.

Directors to appoint agents, &c.

Directors to require payment of subscriptions. Sec. 2, act of 1864.

Officers to hold for three years altered by sec. 13, 1864.

ors. Annual meetings of the stockholders of the said corporation, for the choice of officers (when they are to be chosen) and for the transaction of annual business, shall be holden at such time and place and upon such notice as may be prescribed in the by-laws.

Right of way granted.

SEC. 2. *And be it further enacted*, That the right of way through the public lands be, and the same is hereby, granted to said company for the construction of said railroad and telegraph line; and the right, power, and authority is hereby given to said company to take from the public lands adjacent to the line of said road, earth, stone, timber, and other materials for the construction thereof; said right of way is granted to said railroad to the extent of two hundred feet in width on each side of said railroad where it may pass over the public lands, including all necessary grounds for stations, buildings, workshops, and depots, machine shops, switches, side tracks, turn-tables, and water-stations. The United States shall extinguish, as rapidly as may be, the Indian titles to all lands falling under the operation of this act, and required for the said right of way and grants hereinafter made.

See sec. 3, 1864.

U. S. to extinguish Indian titles. Sec. 18, 1864.

Land grants—alternate sections.

SEC. 3. *And be it further enacted*, That there be, and is hereby, granted to the said company, for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores thereon, every alternate section of public land, designated by odd numbers, to the amount of *five* alternate sections per mile on each side of said railroad, on the line thereof, and within the limits of *ten* miles on each side of said road, not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached, at the time the line of said road is definitely fixed: *Provided*, That all *mineral lands* shall be excepted from the operation of this act; but where the same shall contain timber, the timber thereon is hereby granted to said company. And all such lands, so granted by this section, which shall not be sold or disposed of by said company within three years after the entire road shall have been completed, shall be subject to settlement and pre-emption, like other lands, at a price not exceeding one dollar and twenty-five cents per acre, to be paid to said company.

Chang'd to TEN by sec. 4, 1864.

Changed to TWENTY. Sec. 4, 1864.

Minerals and timber. Sec. 4, 1864.

On completion of forty miles [changed to TWENTY by sec. 6, 1864] U. S. com'rs to examine.

SEC. 4. *And be it further enacted*, That whenever said company shall have completed forty consecutive miles of any portion of said railroad and telegraph line, ready for the service contemplated by this act, and supplied with all neces-

sary drains, culverts, viaducts, crossings, sidings, bridges, turnouts, watering places, depots, equipments, furniture, and all other appurtenances of a first class railroad, the rails and all the other iron used in the construction and equipment of said road to be American manufacture of the best quality, the President of the United States shall appoint three commissioners to examine the same and report to him in relation thereto; and if it shall appear to him that forty consecutive miles of said railroad and telegraph line have been completed and equipped in all respects as required by this act, then, upon certificate of said commissioners to that effect, patents shall issue conveying the right and title to said lands to said company, on each side of the road as far as the same is completed, to the amount aforesaid; and patents shall in like manner issue as each forty miles of said railroad and telegraph line are completed, upon certificate of said commissioners. Any vacancies occurring in said board of commissioners, by death, resignation, or otherwise, shall be filled by the President of the United States: *Provided, however*, That no such commissioners shall be appointed by the President of the United States unless there shall be presented a statement, verified on oath by the president of said company, that such forty miles have been completed in the manner required by this act, and setting forth with certainty the points where such forty miles begin and where the same end; which oath shall be taken before a judge of a court of record.

And patents of land to issue.

Vacancies in comm'rs. See sec. 8, act of 1864.

Government bonds. See sec. 8, act 1864, also sec. 10.

SEC. 5. *And be it further enacted*, That for the purposes herein mentioned, the Secretary of the Treasury shall, upon the certificate in writing of said commissioners of the completion and equipment of forty consecutive miles of said railroad and telegraph, in accordance with the provisions of this act, issue to said company bonds of the United States of one thousand dollars each, payable in thirty years after date, bearing six per centum per annum interest (said interest payable semi-annually), which interest may be paid in United States treasury notes, or any other money or currency which the United States have or shall declare lawful money and a legal tender, to the amount of sixteen of said bonds per mile for such section of forty miles; and to secure the repayment to the United States, as hereinafter provided, of the amount of said bonds so issued and delivered to said company, together with all interest thereon which shall have been paid by the United States, the issue of said bonds and delivery to the company shall *ipso facto* constitute a first mortgage on the whole line

Now 20 miles. Sec. 10, 1864.

See sec. 11 of this act, for $32,000 and $48,000 per mile.

Lien of U. S. bonds made subordinate. See sec. 10, act of 1864.

of the railroad and telegraph, together with the rolling stock, fixtures, and property of every kind and description, and in consideration of which said bonds may be issued; and on the refusal or failure of said company to redeem said bonds, or any part of them, when required so to do by the Secretary of the Treasury, in accordance with the provisions of this act, the said road, with all the rights, functions, immunities, and appurtenances thereunto belonging, and also all lands granted to the said company by the United States, which at the time of said default shall remain in the ownership of the said company, may be taken possession of by the Secretary of the Treasury, for the use and benefit of the United States: *Provided*, This section shall not apply to that part of any road now constructed.

See sec. 10, act 1864.

Modified. See sec. 5, act of 1864.

SEC. 6. *And be it further enacted*, That the grants aforesaid are made upon condition that said company shall pay said bonds at maturity, and shall keep said railroad and telegraph line in repair and use, and shall at all times transmit dispatches over said telegraph line, and transport mails, troops, munitions of war, supplies, and public stores upon said railroad for the government, whenever required to do so by any department thereof, and that the government shall at all times have the preference in the use of the same for all the purposes aforesaid (at fair and reasonable rates of compensation, not to exceed the amounts paid by private parties for the same kind of service); and all compensation for services rendered for the government shall be applied to the payment of said bonds and interest until the whole amount is fully paid. Said company may also pay the United States, wholly or in part, in the same or other bonds, treasury notes, or other evidences of debt against the United States, to be allowed at par; and after said road is completed, until said bonds and interest are paid, at least five per centum of the net earnings of said road shall also be annually applied to the payment thereof.

Bonds, when and how paid.

Government transportation — half to be paid in cash. See sec. 5, act of 1864.

SEC. 7. *And be it further enacted*, That said company shall file their assent to this act, under the seal of said company, in the Department of the Interior, within one year after the passage of this act, and shall complete said railroad and telegraph from the point of beginning, as herein provided, to the western boundary of Nevada territory, before the first day of July, one thousand eight hundred and seventy-four: *Provided*, That within two years after the passage of this act, said company shall designate the general route of said road, as near as may be, and shall file a map of the same in the Department of the Interior, where-

Assent of company to be filed, &c.

Time of completion extended. See sec. 6, 1864.

under this act, with the said Kansas company, in construct ing said railroad and telegraph to said meridian of longitude, with the consent of the said State of Kansas; and in case said first named company shall complete their line to the eastern boundary of California before it is completed across said State by the Central Pacific Railroad Company of California, said first named company is hereby authorized to continue in constructing the same through California, with the consent of said State, upon the terms mentioned in this act, until said roads shall meet and connect, and the whole line of said railroad and telegraph is completed; and

Central Pacific R. R. Co. may continue, &c., to meet other road.

the Central Pacific Railroad Company of California, after completing its road across said State, is authorized to continue the construction of said railroad and telegraph through the territories of the United States* to the Missouri River, including the branch roads specified in this act, upon the routes hereinbefore and hereinafter indicated, on the terms and conditions provided in this act in relation to the said Union Pacific Railroad Company, until said roads shall meet and connect, and the whole line of said railroad and branches and telegraph is completed.

Authority confirmed. See sec. 16, act of 1864, last clause. Also sec. 2, 1866.

Subsidy bonds; treble over the Rocky and Sierra Nevada Mountains.

SEC. 11. *And be it further enacted*, That for three hundred miles of said road most mountainous and difficult of construction, to wit, one hundred and fifty miles westwardly from the eastern base of the Rocky Mountains, and one hundred and fifty miles eastwardly from the western base of the Sierra Nevada Mountains, said points to be fixed by the President of the United States, the bonds to be issued to aid in the construction thereof shall be treble the number per mile hereinbefore provided, and the same shall be issued, and the lands herein granted be set apart, upon the construction of every twenty miles thereof upon the certificate of the commissioners as aforesaid that twenty consecutive miles of the same are completed; and between the sections last named of one hundred and fifty miles each, the bonds to be issued to aid in the construction thereof shall be double the number per mile first mentioned, and the same shall be issued, and the lands herein granted be set apart, upon the construction of every twenty miles thereof upon the certificate of the commissioners as aforesaid that twenty consecutive miles of the same are completed: *Provided*, That no more than fifty thousand of said bonds shall be issued under this act to aid in constructing the main line of said railroad and telegraph.

Subsidy bonds, double between mountains.

* See section 6, act July 2, 1864. The words "and States intervening" inserted.

Location at State lines and 100 meridian.

SEC. 12. *And be it further enacted*, That whenever the route of said railroad shall cross the boundary of any State or territory, or said meridian of longitude, the two companies meeting or uniting there shall agree upon its location at that point, with reference to the most direct and practicable through route; and in case of difference between them as to said location, the President of the United States shall determine the said location,—the companies named in each State and territory to locate the road across the same between the points so agreed upon, except as herein provided. The track upon the entire line of railroad and branches shall be of uniform width, to be determined by the President of the United States, so that, when completed, cars can be run from the Missouri River to the Pacific coast;* the grades and curves shall not exceed the maximum grades and curves of the Baltimore and Ohio Railroad; the whole line of said railroad and branches and telegraph shall be operated and used for all purposes of communication, travel, and transportation, so far as the public and government are concerned, as one connected continuous line; and the companies herein named in Missouri, Kansas, and California, filing their assent to the provisions of this act, shall receive and transport all iron rails, chairs, spikes, ties, timber, and all materials required for constructing and finishing said first-mentioned line between the aforesaid point on the one hundredth meridian of longitude and western boundary of Nevada territory, whenever the same is required by said first-named company, at cost, over that portion of the roads of said companies constructed under the provisions of this act.

Track to be of uniform width, &c.

To be used as continuous line, &c.

H. & St. J. road may be extended, &c.

SEC. 13. *And be it further enacted*, That the Hannibal and Saint Joseph Railroad Company of Missouri may extend its roads from Saint Joseph *via* Atchison, to connect and unite with the road through Kansas, upon filing its assent to the provisions of this act, upon the same terms and conditions in all respects, for one hundred miles in length next to the Missouri River, as are provided in this act for the construction of the railroad and telegraph line first mentioned, and may for this purpose use any railroad charter which has been or may be granted by the legislature of Kansas: *Provided*, that if actual survey shall render it desirable, the

* The gauge was subsequently fixed by the following act of Congress:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the gauge of the Pacific Railroad and its branches, throughout their whole extent, from the Pacific coast to the Missouri river, shall be, and hereby is, established at four feet eight and one-half inches.

Approved March 3, 1863.

said company may construct their road, with the consent of the Kansas legislature, on the most direct and practicable route west from Saint Joseph, Missouri, so as to connect and unite with the road leading from the western boundary of Iowa at any point east of the one hundredth meridian of west longitude, or with the main trunk road at said point; but in no event shall lands or bonds be given to said company, as herein directed, to aid in the construction of their said road for a greater distance than one hundred miles. And the Leavenworth, Pawnee, and Western Railroad Company of Kansas may construct their road from Leavenworth to unite with the road through Kansas.

Iowa road from western boundary of Iowa.

SEC. 14. *And be it further enacted*, That the said Union Pacific Railroad Company is hereby authorized and required to construct a single line of railroad and telegraph from a point on the western boundary of the state of Iowa, to be fixed by the President of the United States, upon the most direct and practicable route, to be subject to his approval, so as to form a connection with the lines of said company at some point on the one hundredth meridian of longitude aforesaid, from the point of commencement on the western boundary of the State of Iowa, upon the same terms and conditions, in all respects, as are contained in this act for the construction of the said railroad and telegraph first mentioned; and the said Union Pacific Railroad Company shall complete one hundred miles of the road and telegraph in this section provided for in two years after filing their assent to the conditions of this act, as by the terms of this act required, and at the rate of one hundred miles per year thereafter, until the whole is completed: *Provided*, That a failure upon the part of said company to make said connection in the time aforesaid, and to perform the obligations imposed on said company by this section, and to operate said road in the same manner as the main line shall be operated, shall forfeit to the government of the United States all the rights, privileges, and franchises granted to and conferred upon said company by this act. And whenever there shall be a line of railroad completed through Minnesota or Iowa to Sioux City, then the said Pacific Railroad Company is hereby authorized and required to construct a railroad and telegraph from said Sioux City upon the most direct and practicable route to a point on, and so as to connect with, the branch railroad and telegraph in this section hereinbefore mentioned, or with the said Union Pacific Railroad, said point of junction to be fixed by the President of the United States, not further west than the one hundredth

U. P. R. R. Co. required to construct Sioux City road. Sec. 16, act of 1864.

meridian of longitude aforesaid, and on the same terms and conditions as provided in this act for the construction of the Union Pacific Railroad as aforesaid, and to complete the same at the rate of one hundred miles per year; and should said company fail to comply with the requirements of this act in relation to the said Sioux City railroad and telegraph, the said company shall suffer the same forfeitures prescribed in relation to the Iowa branch railroad and telegraph hereinbefore mentioned.

Other companies may connect, &c.

SEC. 15. *And be it further enacted*, That any other railroad company now incorporated, or hereafter to be incorporated, shall have the right to connect their road with the road and branches provided for by this act, at such places and upon such just and equitable terms as the President of the United States may prescribe. Wherever the word company is used in this act, it shall be construed to embrace the words their associates, successors, and assigns, the same as if the words had been properly added thereto.

Word company explained.

Companies authorized to consolidate. See sec. 16, act of 1864. Also sec. 10 of this act.

SEC 16. *And be it further enacted*, That at any time after the passage of this act all of the railroad companies named herein, and assenting hereto, or any two or more of them, are authorized to form themselves into one consolidated company; notice of such consolidation, in writing, shall be filed in the Department of the Interior, and such consolidated company shall thereafter proceed to construct said railroad and branches and telegraph line, upon the terms and conditions provided in this act.

Congress may compel speedy completion of road.

SEC. 17. *And be it further enacted*, That in case said company or companies shall fail to comply with the terms and conditions of this act, by not completing said road and telegraph and branches within a reasonable time, or by not keeping the same in repair and use, but shall permit the same for an unreasonable time to remain unfinished or out of repair and unfit for use, congress may pass any act to insure the speedy completion of said road and branches, or put the same in repair and use, and may direct the income of said railroad and telegraph line to be thereafter devoted to the use of the United States, to repay all such expenditures caused by the default and neglect of such company or companies: *Provided*, That if said roads are not completed, so as to form a continuous line of railroad, ready for use, from the Missouri River to the navigable waters of the Sacramento river, in California, by the first day of July, eighteen hundred and seventy-six, the whole of all of said railroads before mentioned, and to be constructed under the provisions of this act, together with

Main line to be finished in 1876. See secs. 5 and 7, act of 1864.

all their furniture, fixtures, rolling stock, machine shops, lands, tenements, and hereditaments, and property of every kind and character, shall be forfeited to and be taken possession of by the United States: *Provided*, That of the bonds of the United States in this act provided to be delivered for any and all parts of the roads to be constructed east of the one hundredth meridian of west longitude from Greenwich, and for any part of the road west of the west foot of the Sierra Nevada mountains, there shall be reserved of each part and instalment twenty-five per centum, to be and remain in the United States treasury, undelivered, until said road, and all parts thereof provided for in this act, are entirely completed; and of all the bonds provided to be delivered for the said road, between the two points aforesaid, there shall be reserved out of each instalment fifteen per centum, to be and remain in the Treasury until the whole of the road provided for in this act is fully completed; and if the said road, or any part thereof, shall fail of completion at the time limited therefor in this act, then and in that case the said part of said bonds so reserved shall be forfeited to the United States.

Repealed. See sec. 7, act of 1864.

Under certain circumstances congress may reduce rates of fare.

SEC. 18. *And be it further enacted*, That whenever it appears that the net earnings of the entire road and telegraph, including the amount allowed for services rendered for the United States, after deducting all expenditures—including repairs, and the furnishing, running, and managing of said road—shall exceed ten per centum upon its cost (exclusive of the five per centum to be paid to the United States), congress may reduce the rates of fare thereon, if unreasonable in amount, and may fix and establish the same by law. And the better to accomplish the object of this act, namely, to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the government at all times (but particularly in time of war) the use and benefits of the same for postal, military, and other purposes, congress may at any time—having due regard for the rights of said companies named herein—add to, alter, amend, or repeal this act.

May arrange with telegraph companies now existing.

SEC. 19. *And be it further enacted*, That the several railroad companies herein named are authorized to enter into an arrangement with the Pacific Telegraph Company, the Overland Telegraph Company, and the California State Telegraph Company, so that the present line of telegraph between the Missouri river and San Francisco may be moved upon or along the line of said railroad and branches

as fast as said roads and branches are built; and if said arrangement be entered into, and the transfer of said telegraph line be made in accordance therewith to the line of said railroad and branches, such transfer shall, for all purposes of this act, be held and considered a fulfillment, on the part of said railroad companies, of the provisions of this act in regard to the construction of said line of telegraph. And in case of disagreement, said telegraph companies are authorized to remove their line of teleg aph along and upon the line of railroad herein contemplated, without prejudice to the rights of said railroad companies named herein. See sec. 15, act of 1864.

SEC. 20. *And be it further enacted*, That the corporation hereby created and the roads connected therewith under the provisions of this act, shall make to the Secretary of the Treasury an annual report, wherein shall be set forth: Companies to make annual report.

First. The names of the stockholders and their places of residence, so far as the same can be ascertained.

Second. The names and residences of the directors, and all other officers of the company.

Third. The amount of stock subscribed, and the amount thereof actually paid in.

Fourth. A description of the lines of road surveyed, of the lines thereof fixed upon for the construction of the road, and the cost of such survey.

Fifth. The amount received from passengers on the road.

Sixth. The amount received for freight thereon.

Seventh. A statement of the expense of said road and its fixtures.

Eighth. A statement of the indebtedness of said company, setting forth the various kinds thereof; which report shall be sworn to by the president of the said company, and shall be presented to the Secretary of the Treasury on or before the first day of July in each year.*

*AN ACT relating to filing reports of railroad companies.—[15 Stat. 79.]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the reports required to be made to the Secretary of the Treasury on or before the first day of July of each year, by the corporations created by or entitled to subsidies under the provisions of an act entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific ocean, and to secure to the government the use of the same for postal, military, and other purposes," approved July first, eighteen hundred and sixty-two, and the acts supplemental to and amendatory thereof, shall hereafter be made to the Secretary of the Interior, on or before the first day of October of each year. Said reports shall furnish full and specific information upon the several points mentioned in the twentieth section of the said act of eighteen hundred and sixty-two, and shall be verified as therein prescribed, and, on failure to make the same as herein

12 Stat., 538. AN ACT to amend an act entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific ocean, and to secure to the government the use of the same for postal, military, and other purposes," approved July 2 [1], 1862.

First meeting of commissioners on Pacific Railroad and telegraph, to be held in Chicago.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the first meeting of the commissioners named in the act entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the government the use of the same for postal, military, and other purposes," approved July second [first], eighteen hundred and sixty-two, and of the five commissioners directed by said act to be appointed by the Secretary of the Interior, shall be held at Bryan hall, in the city of Chicago, in the State of Illinois, on the first Tuesday of September next, at twelve o'clock at noon. A notice of said meeting, to be signed by at least ten of the commissioners named in said act, shall be published at least once a week during the six successive weeks commencing on the twentieth of July, one thousand eight hundred and sixty-two, in one daily newspaper in each of the cities of Boston, New York, Philadelphia, Cincinnati, Chicago, and St. Louis, and no other notice of said meeting shall be requisite.

Notice.

Approved July 12, 1862.

---

required, the issue of bonds or patents to the company in default shall be suspended until the requirements of this act shall be complied with by such company. And the reports hitherto made to the Secretary of the Treasury, under the said act of July first, eighteen hundred and sixty-two, shall be transferred and delivered by him to the Secretary of the Interior to be filed by him.

* * * * * * *

SEC. 3. *And be it further enacted*, That the reports required from the commissioners appointed to examine and report in relation to the road of any of the corporations whereto reference is made in this act, shall be addressed to and filed in the Department of the Interior; and all such reports heretofore made shall be transferred to and filed in said Department of the Interior; and so much of any and all acts as requires any reports from such companies, or any officers thereof, to be made to the Secretary of the Treasury, is hereby repealed.

SEC. 4. *And be it further enacted*, That, in addition to the eight subjects referred to in section twenty of the act of July, eighteen hundred and sixty-two, to be reported upon, there shall also be furnished annually to the Secretary of the Interior all reports of engineers, superintendents, or other officers who make annual reports to any of said railroad companies.

Approved June 25, 1868.

AMENDMENT OF JULY 2, 1861.

AN ACT to amend an act entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific ocean, and to secure to the government the use of the same for postal, military, and other purposes," approved July first, eighteen hundred and sixty-two. 13 Stat., 356.

Shares of U. P. R. R. Co. changed from $1,000 to $100.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the capital stock of the company entitled the Union Pacific Railroad Company, authorized by the act of which this act is amendatory, shall be in shares of one hundred dollars, instead of one thousand dollars, each; that the number of shares shall be one million, instead of one hundred thousand; and that the number of shares which any person shall hold to entitle him to serve as a director in said company (except the five directors to be appointed by the government) shall be fifty shares, instead of five shares; and that every subscriber to said capital stock for each share of one thousand dollars, heretofore subscribed, shall be entitled to a certificate for ten shares of one hundred dollars each; and that the following words in section first of said act, "which shall be subscribed for and held in not more than two hundred shares by any one person," be, and the same are hereby, repealed.

Books to be kept open in several cities. 1860, sec. 2.

SEC. 2. *And be it further enacted*, That the Union Pacific Railroad Company shall cause books to be kept open to receive subscriptions to the capital stock of said company (until the entire capital of one hundred millions of dollars shall be subscribed) at the general office of said company in the city of New York, and in each of the cities of Boston, Philadelphia, Baltimore, Chicago, Cincinnati, and St. Louis, at such places as may be designated by the President of the United States, and in such other localities as may be directed by him. No subscription for said stock shall be deemed valid unless the subscriber therefor shall, at the time of subscribing, pay or remit to the treasurer of the company an amount per share subscribed by him equal to the amount per share previously paid by the then existing stockholders. The said company shall make assessments upon its stockholders of not less than five dollars per share, and at intervals of not exceeding six months from and after the passage of this act, until the par value of all shares subscribed shall be fully paid; and money only shall be receivable for any such assessment, or as equivalents for any portion of the capital stock hereinbefore authorized. The

Per cent. to be paid.

Assessments of stockholders.

How paid.

Amount of capital.

capital stock of said company shall not be increased beyond the actual cost of said road. And the stock of the company

Stock personal property.

shall be deemed personal property, and shall be transferable on the books of the company, at the general office of said company in the city of New York, or at such other transfer office as the company may establish.

Additional right of way granted. See sec. 2, 1862.

SEC. 3. *And be it further enacted*, That the Union Pacific Railroad Company, and all other companies provided for in this act and the act to which this is an amendment, be, and hereby are, empowered to enter upon, purchase, take, and hold any lands or premises that may be necessary and proper for the construction and working of said road, not exceeding in width one hundred feet on each side of its centre line, unless a greater width be required for the purpose of excavation or embankment; and also any land or premises that may be necessary and proper for turnouts, standing places for cars, depots, station-houses, or any other structures required in the construction and operating of said road. And each of said companies shall have the right to cut and remove trees or other materials that might by falling encumber its road-bed, though standing or being more than one hundred feet therefrom. And in case the

Assessment of damages.

owner or claimant of such lands or premises and such company cannot agree as to the damages, the amount shall be determined by the appraisal of three disinterested commissioners, who may be appointed upon application by any party to any judge of a court of record in any of the territories in which the land or premises to be taken lie; and said commissioners, in their assessments of damages, shall appraise such premises at what would have been the value thereof if the road had not been built; and upon return into court

Payment and title.

of such appraisement, and upon the payment to the clerk thereof of the amount so awarded by the commissioners for the use and benefit of the owner thereof, said premises shall be deemed to be taken by said company, which shall thereby acquire full title to the same for the purposes aforesaid.

Appeal.

And either party feeling aggrieved by said assessment may, within thirty days, file an appeal therefrom, and demand a jury of twelve men to estimate the damage sustained; but such appeal shall not interfere with the rights of said company to enter upon the premises taken, or to do any act

Bonds on appeal.

necessary in the construction of its road. And said party appealing shall give bonds with sufficient surety or sureties for the payment of any costs that may arise upon such

Costs of appeal

appeal. And in case the party appealing does not obtain a more favorable verdict, such party shall pay the whole cost

incurred by the appellee as well as its own. And the payment into court, for the use of the owner or claimant, of a sum equal to that finally awarded shall be held to vest in said company the title of said land, and the right to use and occupy the same for the construction, maintaining, and operating of the road of said company. And in case any of the lands to be taken as aforesaid shall be held by any person residing without the territory or subject to any legal disability, the court may appoint a proper person, who shall give bonds, with sufficient surety or sureties, for the faithful execution of his trust, and who may represent in court the person disqualified or absent as aforesaid, when the same proceedings shall be had in reference to the appraisement of the premises to be taken and with the same effect as have been already described. And the title of the company to the land taken by virtue of this act shall not be affected nor impaired by reason of any failure by any guardian to discharge faithfully his trust. And in case it shall be necessary for either of the said companies to enter upon lands which are unoccupied, and of which there is no apparent owner or claimant, it may proceed to take and use the same for the purpose of its said railroad, and may institute proceedings in manner described for the purpose of ascertaining the value of and acquiring a title to the same; and the court may determine the kind of notice to be served on such owner or owners, and may in its discretion appoint an agent or guardian to represent such owner or owners in case of his or their incapacity or non-appearance. But in case no claimant shall appear within six years from the time of the opening of said road across any land, all claim to damages against said company shall be barred. It shall be competent for the legal guardian of any infant or any other person under guardianship to agree with the proper company as to damages sustained by reason of the taking of any lands of any such person under disability, as aforesaid, for the use as aforesaid; and upon such agreement being made, and approved by the court having supervision of the official acts of said guardian, the said guardian shall have full power to make and execute a conveyance thereof to the said company which shall vest the title thereto in the said company.

Title after appeal.

Absentees and infants.

Unoccupied lands, how acquired.

Damages, how disposed of.

SEC. 4. *And be it further enacted*, That section three of said act be hereby amended by striking out the word "five," where the same occurs in said section, and by inserting in lieu thereof the word "ten;" and by striking out the word "ten," where the same occurs in said section, and inserting in lieu thereof the word "twenty." And section seven of

Sec. 3, 1862, amended, doubling grant of land.

Sec. 7, 1862, amended, withdrawing land from sale.

said act is hereby amended by striking out the word "fifteen," where the same occurs in said section, and inserting in lieu thereof the word "twenty-five." And the term "mineral land," wherever the same occurs in this act, and the act to which this is an amendment, shall not be construed to include coal and iron land. And any lands granted by this act or the act to which this is an amendment shall not defeat or impair any pre-emption, homestead, swamp land, or other lawful claim, nor include any government reservation or mineral lands, or the improvements of any bona fide settler, on any lands returned and denominated as mineral lands, and the timber necessary to support his said improvements as a miner or agriculturist, to be ascertained under such rules as have been or may be established by the Commissioner of the General Land Office, in conformity with the provisions of the pre-emption laws: *Provided*, That the quantity thus exempted by the operation of this act, and the act to which this act is an amendment, shall not exceed 160 acres for each settler who claims as an agriculturist, and such quantity for each settler who claims as a miner, as the said Commissioner may establish by general regulation: *Provided, also*, That the phrase, "but where the same shall contain timber, the timber thereon is hereby granted to said company," in the proviso to said section three, shall not apply to the timber growing or being on any land farther than ten miles from the center line of any one of said roads or branches mentioned in said act, or in this act. And all lands shall be excluded from the operation of this act, and of the act to which this act is an amendment, which were located, or selected to be located, under the provisions of an act entitled "An act donating lands to the several states and territories which may provide colleges for the benefit of agriculture and the mechanic arts," approved July 2, 1862, and notice thereof given at the proper land office.

Coal and iron not minerals.

Certain lands not to be granted.

160 acres only exempted.

Timber to be company's. Sec. 3, 1862.

Other lands exempted.

SEC. 5. *And be it further enacted*, That the time for designating the general route of said railroad, and of filing the map of the same, and the time for the completion of that part of the railroads required by the terms of said act of each company, be, and the same is hereby, extended one year from the time in said act designated:* and that the

Time extended one year. Sec. 10, 1862, amended.

* By joint resolution of Congress, approved March 3, 1865, it is provided: "That all maps, profiles, and other drawings, together with estimates and reports connected with explorations and surveys for the Pacific Railroad, made under the authority of the government, and all other information upon the subject of said road in the possession of any department of the government, be transferred to the Department of the Interior; and that the Secretary of the Interior be authorized to furnish

Central Pacific Railroad Company of California shall be required to complete twenty-five miles of their said road in each year thereafter, and the whole to the state line within four years, and that only one-half of the compensation for services rendered for the government by said companies shall be required to be applied to the payment of the bonds issued by the government in aid of the construction of said roads.

25 miles per year. Four years to State line.

Government to pay one-half for services.

SEC. 6. *And be it further enacted*, That the proviso to section four of said act is hereby modified as follows, viz: And the President of the United States is hereby authorized, at any time after the passage of this act, to appoint for each and every of said roads three commissioners, as provided for in the act to which this act is amendatory; and the verified statement of the president of the California company, required by said section four, shall be filed in the office of the United States surveyor-general for the State of California, instead of being presented to the President of the United States; and the said surveyor-general shall thereupon notify the said commissioners of the filing of such statement, and the said commissioners shall thereupon proceed to examine the portion of said railroad and telegraph line so completed, and make their report thereon to the President of the United States, as provided by the act of which this is amendatory. And such statement may be filed, and such railroad and telegraph line be examined and reported on by the said commissioners, and the requisite amount of bonds may be issued and the lands appertaining thereto may be set apart, located, entered, and patented, as provided in this act and the act to which this is amendatory, upon the construction by said railroad company of California of any portion of not less than twenty consecutive miles of their said railroad and telegraph line, upon the certificate of said commissioners that such portion is completed as required by the act to which this is amendatory. And section ten of the act of which this is amendatory is hereby amended by inserting, after the words "United States," in the last clause, the words "and states intervening."

Sec. 4, 1862, modified, three commissioners, &c.

Affidavit, &c., of C. P. R. R. Co. to be filed in California.

Lands patented. See sec. 4, 1862. Also, sec. 8, this act.

Sec. 10, 1862, amended.

SEC. 7. *And be it further enacted*, That so much of section seventeen of said act as provides for a reservation by the government of a portion of the bonds to be issued to aid in the construction of the said railroads is hereby repealed.

Reservation of bonds by sec. 17, 1862, repealed.

copies of the same, free of charge, to the Union Pacific Railroad Company, so far as they may be useful in aiding said company in determining the proper route for said road."

Failure of one company not to affect others. Sec. 17, 1862, altered.

And the failure of any one company to comply fully with the conditions and requirements of this act, or the act to which this is amendatory, shall not work a forfeiture of the rights, privileges, or franchise of any other company or companies that shall have complied with the same.

SEC. 8. *And be it further enacted*, That for the purpose of facilitating the work on said railroad, and of enabling the said company as early as practicable to commence the grading of said railroad in the region of the mountains,

Partial issue of bonds on uncompleted work. Sec. 11, 1862, modified.

between the eastern base of the Rocky Mountains and the western base of the Sierra Nevada Mountains, so that the same may be finally completed within the time required by law, it is hereby provided that whenever the chief engineer of the said company, and said commissioners, shall certify that a certain proportion of the work required to prepare the road for the superstructure on any such section of twenty miles is done (which said certificate shall be duly verified), the Secretary of the Treasury is hereby authorized and required, upon the delivery of such certificate, to issue to said company a proportion of said bonds, not exceeding two thirds of the amount of bonds authorized to be issued under the provisions of the act, to aid in the construction of such section of twenty miles, nor in any case

Two-thirds on graded portions. See sec. 6 of this act.

exceeding two thirds of the value of the work done. The remaining one third to remain until the said section is fully completed and certified by the commissioners appointed by the President, according to the terms and provisions of the said act. And no such bonds shall issue to the Union

U. P. R. R. Co. cannot receive for more than 300 miles in advance west of Salt Lake City.

Pacific Railroad Company for work done west of Salt Lake City under this section, more than three hundred miles in advance of the completed continuous line of said railroad from the point of beginning on the one hundredth meridian of longitude.

SEC. 9. *And be it further enacted*, That, to enable any one of said corporations to make convenient and necessary connections with other roads, it is hereby authorized to estab-

Ferries and bridges.

lish and maintain all necessary ferries upon and across the Missouri river and other rivers which its road may pass in its course; and authority is hereby given said corporation to construct bridges over said Missouri river and all other rivers for the convenience of said road:* *Provided*,

*AN ACT to authorize the Union Pacific Railroad Company to issue its bonds to construct a bridge across the Missouri River at Omaha, Nebraska, and Council Bluffs, Iowa. (16 Stat., 430.)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That for the more perfect connection of any railroads that are or shall be constructed to the Missouri

That any bridge or bridges it may construct over the Missouri river, or any other navigable river on the line of said road, shall be constructed with suitable and proper draws for the passage of steamboats, and shall be built, kept, and maintained, at the expense of said company, in such manner as not to impair the usefulness of said river for navigation to any greater extent than such structures of the most approved character necessarily do: *And provided further*, That any company authorized by this act to construct its road and telegraph line from the Missouri river to the initial point aforesaid, may construct its road and telegraph line so as to connect with the Union Pacific Railroad at any point westwardly of such initial point, in case such company shall deem such westward connection more practicable or desirable; and in aid of the construction of so much of its road and telegraph line as shall be a departure from the route hereinbefore provided for its road, such company shall be entitled to all the benefits and be subject to all the conditions and restrictions of this act: *Provided further, however*, That the bonds of the United States shall not be issued to such company for a greater amount than is hereinbefore provided, if the same had united with the Union Pacific Railroad on the one hundredth degree of longitude; nor

Roads may connect west of initial point.

No increased amount of bonds &c.

river, at or near Council Bluffs, Iowa, and Omaha, Nebraska, the Union Pacific Railroad Company be, and it is hereby, authorized to issue such bonds, and secure the same by mortgage on the bridge and approaches and appurtenances, as it may deem needful to construct and maintain its bridge over said river, and the tracks and depots required to perfect the same, as now authorized by law of Congress; and said bridge may be so constructed as to provide for the passage of ordinary vehicles and travel, and said company may levy and collect tolls and charges for the use of the same: and for the use and protection of said bridge and property the Union Pacific Railway Company shall be empowered, governed, and limited by the provisions of the act entitled "An act to authorize the construction of certain bridges, and to establish them as post roads," approved July twenty-five, eighteen hundred and sixty-six, so far as the same is applicable thereto: *And provided*, That nothing in this act shall be so construed as to change the eastern terminus of the Union Pacific Railroad from the place where it is now fixed under existing laws, nor to release said Union Pacific Railroad Company, or its successors, from its obligation as established by existing laws: *Provided, also*, That Congress shall at all times have power to regulate said bridge, and the rates for the transportation of freight and passengers over the same, and the local travel hereinbefore provided for. And the amount of bonds herein authorized shall not exceed two and a half millions of dollars: *Provided*, That if said bridge shall be constructed as a draw bridge, the same shall be constructed with spans of not less than two hundred feet in length in the clear on each side of the central or pivot pier of the draw.

Approved February 24, 1871.

shall such company be entitled to receive any greater amount of alternate sections of public lands than are also herein provided.

First mortgage bonds may have lien, prior to governments.

SEC. 10. *And be it further enacted*, That section five of said act be so modified and amended that the Union Pacific Railroad Company, the Central Pacific Railroad Company, and any other company authorized to participate in the construction of said road, may, on the completion of each section of said road, as provided in this act and the act to which this

Sec. 5, 1862, modified.

act is an amendment, issue their first mortgage bonds on their respective railroad and telegraph lines to an amount not

See sec. 1, act of 1865.

exceeding the amount of the bonds of the United States, and of even tenor and date, time of maturity, rate and character of interest, with the bonds authorized to be issued to said

Lien of U. S. bonds to be subordinate, &c.

railroad companies respectively. And the lien of the United States bonds shall be subordinate to that of the bonds of any or either of said companies hereby authorized to be issued on their respective roads, property, and equipments, except as to the provisions of the sixth section of the act to which this act is an amendment, relating to the transmission of dispatches, and the transportation of mails, troops, munitions of war, supplies, and public stores for the government of the United States. And said section is further amended by striking out the word "forty," and insert-

20 miles instead of 40 miles, as in sec. 5, act of 1862.

ing in lieu thereof the words "on each and every section of not less than twenty."

SEC. 11. *And be it further enacted*, That, if any of the railroad companies, entitled to bonds of the United States

Provision for bonds already issued by any companies.

or to issue their first mortgage bonds herein provided for, has, at the time of the approval of this act, issued or shall thereafter issue any of its own bonds or securities in such form and manner as in law or equity to entitle the same to priority or preference of payment to the said guaranteed bonds, or said first mortgage bonds, the amount of such corporate bonds outstanding and unsatisfied, or uncancelled, shall be deducted from the amount of such government and first mortgage bonds which the company may be entitled to receive and issue; and such an amount only of such government bonds and such first mortgage bonds shall be granted, or permitted, as, added to such outstanding, unsatisfied, or uncancelled bonds of the company, shall make up the whole amount per mile to which the company would

Affidavit of am't of outstanding company bonds.

otherwise have been entitled: *And provided further*, That, before any bonds shall be so given by the United States, the company claiming them shall present to the secretary of the treasury an affidavit of the president and secretary

of the company, to be sworn to before the judge of a court of record, setting forth whether said company has issued any such bonds or securities, and, if so, particularly describing the same, and such other evidence as the secretary may require, so as to enable him to make the deduction herein required; and such affidavit shall then be filed and deposited in the office of the secretary of the interior, and any person swearing falsely to any such affidavit shall be deemed guilty of perjury, and, on conviction thereof, shall be punished as aforesaid: *Provided, also*, That no land granted by this act shall be conveyed to any party or parties, and no bonds shall be issued to any company or companies, party or parties, on account of any road or part thereof, made prior to the passage of the act to which this act is an amendment, or made subsequent thereto, under the provisions of any act or acts other than this act and the act amended by this act.

No land or bonds to go to any co. on road made prior to act of 1862.

SEC. 12. *And be it further enacted*, That the Leavenworth, Pawnee & Western Railroad Company, now known as the Union Pacific Railroad Company, eastern division, shall build the railroad from the mouth of Kansas river, by the way of Leavenworth, or, if that be not deemed the best route, then the said company shall, within two years, build a railroad from the city of Leavenworth to unite with the main stem at or near the city of Lawrence; but to aid in the construction of said branch the said company shall not be entitled to any bonds. And, if the Union Pacific Railroad Company shall not be proceeding in good faith to build the said railroad through the territories when the Leavenworth, Pawnee & Western Railroad Company, now known as the Union Pacific Railroad Company, eastern division, shall have completed their road to the hundredth degree of longitude, then the last named company may proceed to make said road westward until it meets and connects with the Central Pacific Railroad Company on the same line. And the said railroad, from the mouth of Kansas river to the one hundredth meridian of longitude, shall be made by the way of Lawrence and Topeka, or on the bank of the Kansas river opposite said towns: *Provided*, That no bonds shall be issued or land certified by the United States to any person or company for the construction of any part of the main trunk line of said railroad west of the one hundredth meridian of longitude and east of the Rocky Mountains, until said road shall be completed from or near Omaha, on the Missouri river, to the said one hundredth meridian of longitude.

Leavenworth and Lawrence roads; no bonds.

If built to 100th meridian, may proceed in default of U. P. R. R.

By way of Lawrence and Topeka, or opposite to 100th meridian. West of that line no bonds shall be issued, &c.

SEC. 13. *And be it further enacted*, That at and after the next election of directors, the number of directors to be elected by the stockholders shall be fifteen; and the number of directors to be appointed by the President shall be five; and the President shall appoint three additional directors to serve until the next regular election, and thereafter five directors. At least one of said government directors shall be placed on each of the standing committees of said company, and at least one on every special committee that may be appointed. The government directors shall, from time to time, report to the Secretary of the Interior, in answer to any inquiries he may make of them, touching the condition, management, and progress of the work; and shall communicate to the Secretary of the Interior, at any time, such information as should be in the possession of the department. They shall, as often as may be necessary to a full knowledge of the condition and management of the line, visit all portions of the line of the road, whether built or surveyed; and, while absent from home, attending to their duties as directors, shall be paid their actual travelling expenses, and be allowed and paid such reasonable compensation for their time actually employed as the board of directors may decide.

Directors, 15; government directors, 5. Sec. 1, 1862, modified.

One government director on committees.

Government directors to report, &c.

To visit road, &c.

SEC. 14. *And be it further enacted*, That the next election for directors of said railroad shall be held on the first Wednesday of October* next, at the office of said company in the city of New York, between the hours of ten o'clock a. m. and four o'clock p. m. of said day; and all subsequent regu-

Directors, when elected and where—(Sec. 1, 1862.) for one year.

* Changed by joint resolution approved December 20, 1867, as follows:

JOINT RESOLUTION changing the time of holding the annual meeting of the stockholders of the Union Pacific Railroad Company.—[15 Stat., 245.]

Be it resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the time of holding the annual meeting of the stockholders of the Union Pacific Railroad Company, for the choice of directors, is hereby changed from the first Wednesday in October to the first Wednesday following the fourth day of March, and the stockholders are authorized to determine the place at which such annual meeting shall be held at the last annual meeting of the stockholders immediately preceding such annual meeting: *Provided*, The same shall be held at either of the cities of New York, Washington, Boston, Baltimore, Philadelphia, Cincinnati, Chicago, or St. Louis: *And provided further*, That on the election of directors herein provided for, to take place in March, Anno Domini eighteen hundred and sixty-eight, the terms of office of all persons then acting or claiming the right to act as directors of said company, shall cease and determine.

lar elections shall be held annually thereafter at the same;* and the directors shall hold their office for one year, and until their successors are qualified.

Road to be used as one continuous line. See sec. 12, act of 1862.

SEC. 15. *And be it further enacted*, That the several companies authorized to construct the aforesaid roads are hereby required to operate and use said roads and telegraph for all purposes of communication, travel, and transportation, so far as the public and the government are concerned, as one continuous line; and, in such operation and use, to afford and secure to each equal advantages and facilities as to rates, time, and transportation, without any discrimination of any kind in favor of the road or business of any or either of said companies, or adverse to the road or business of any or either of the others. And it shall not be lawful for the proprietors of any line of telegraph authorized by this act, or the act amended by this act, to refuse or fail to convey for all persons requiring the transmission of news and messages of like character, on pain of forfeiting to the person injured, for each offence, the sum of one hundred dollars, and such other damage as he may have suffered on account of said refusal or failure, to be sued for and recovered in

Must telegraph for all persons. See sec. 19, act of 1862.

* The second section of the act of July 27, 1868, provides [15 Stat., 243]:

"That any corporation, or any member thereof, other than a banking corporation, organized under a law of the United States, and against which a suit at law or in equity has been or may be commenced in any court other than a circuit or district court of the United States, for any liability or alleged liability of such corporation, or any member thereof as such member, may have such suit removed from the court in which it may be pending, to the proper circuit or district court of the United States, upon filing a petition therefor, verified by oath, either before or after issue joined, stating that they have a defence arising under or by virtue of the constitution of the United States, or any treaty or law of the United States, and offering good and sufficient surety for entering in such court, on the first day of its session, copies of all process, pleadings, depositions, testimony, and other proceedings in said suit, and doing such other appropriate acts as are required to be done by the act entitled 'An act for the removal of causes in certain cases from state courts,' approved July twenty-seventh, eighteen hundred and sixty-six; and it shall be thereupon the duty of the court to accept the surety and proceed no further in the suit; and the said copies being entered as aforesaid in such court of the United States, the suit shall then proceed in the same manner as if it had been brought there by original process, and all of the provisions of said act in this section referred to, respecting any bail, attachment, injunction, or other restraining process, and respecting any bond of indemnity or other obligation given upon the issuing or granting of any attachment, injunction, or other restraining process, shall apply with like force and effect in all respects to similar matters, process, or things in the suits for the removal of which this act provides."

any court of the United States, or of any state or territory of competent jurisdiction.

Companies may consolidate. See sec. 16, act of 1862; also sec. 10, 1862.

SEC. 16. *And be it further enacted*, That any two or more of the companies, authorized to participate in the benefits of this act, are hereby authorized at any time to unite and consolidate their organizations, as the same may or shall be, upon such terms and conditions and in such manner as they may agree upon, and as shall not be incompatible with this act or the laws of the state or states in which the roads of such companies may be, and to assume and adopt such corporate name and style as they may agree upon, with a capital stock not to exceed the actual cost of the roads so to be consolidated, and shall file a copy of such consolidation in the Department of the Interior; and thereupon such organization, so formed and consolidated, shall succeed to, possess, and be entitled to receive from the government of the United States, all and singular the grants, benefits, immunities, guaranties, acts, and things to be done and performed, and be subject to the same terms, conditions, restrictions, and requirements which said companies, respectively at the time of such consolidation, are or may be entitled or subject to under this act, in place and substitution of said companies so consolidated, respectively. And all other provisions of this act, so far as applicable, relating or in any manner appertaining to the companies so consolidated, or either thereof, shall apply and be of force as to such consolidated organization. And in case, upon the completion by such consolidated organization of the roads or either of them, of the companies so consolidated, any other of the road or roads of either of the other companies authorized as aforesaid (and forming, or intended or necessary to form, a portion of a continuous line from each of the several points on the Missouri river, hereinbefore designated, to the Pacific coast,) shall not have constructed the number of miles of its said road within the time herein required, such consolidated organization is hereby authorized to continue the construction of its road and telegraph in the general direction and route upon which such incomplete or unconstructed road is hereinbefore authorized to be built, until such continuation of the road of such consolidated organization shall reach the constructed road and telegraph of said other company, and at such point to connect and unite therewith; and for and in aid thereof the said consolidated organization may do and perform, in reference to such portion of road and telegraph as shall so be in continuation of its constructed road and telegraph, and to the con-

Consolidated companies may build portion of the line left uncompleted by any company.

struction and equipment thereof, all and singular the several acts and things hereinbefore provided, authorized, or granted to be done by the company hereinbefore authorized to construct and equip the same, and shall be entitled to similar and like grants, benefits, immunities, guaranties, acts, and things to be done and performed by the government of the United States, by the President of the United States, by the Secretaries of the Treasury and Interior, and by commissioners, in reference to such company, and to such portion of the road hereinbefore authorized to be constructed by it, and upon the like and similar terms and conditions so far as the same are applicable thereto. And said consolidated company shall pay to said defaulting company the value, to be estimated by competent engineers, of all the work done and material furnished by said defaulting company, which may be adopted and used by said consolidated company in the progress of the work under the provisions of this section: *Provided, nevertheless*, That said defaulting company may, at any time before receiving pay for its said work and material, as hereinbefore provided, on its own election, pay said consolidated company the value of the work done and material furnished by said consolidated company, to be estimated by competent engineers, necessary for and used in the construction of the road of said defaulting company, and resume the control of its said road; and all the rights, benefits, and privileges which shall be acquired, possessed, or exercised, pursuant to this section, shall be to that extent an abatement of the rights, benefits, and privileges hereinbefore granted to such other company. And in case any company authorized thereto shall not enter into such consolidated organization, such company, upon the completion of its road as hereinbefore provided, shall be entitled to, and is hereby authorized to, continue and extend the same under the circumstances, and in accordance with the provisions of this section, and to have all the benefits thereof, as fully and completely as are herein provided touching such consolidated organization. And in case more than one such consolidated organization shall be made, pursuant to this act, the terms and conditions of this act, hereinbefore recited as to one, shall apply in like manner, force, and effect to the other. *Provided, however*, That rights and interests at any time acquired by one such consolidated organization shall not be impaired by another thereof. It is further provided that, should the Central Pacific Railroad Company of California complete their line to the eastern line of the State of California before the line

Powers and duties of consolidated organization.

When Central Pacific Road shall reach eastern line of said State, may go on

150 miles if road not met. Sec. 10, 1862, amended. Also see sec. 2, 1866.

of the Union Pacific Railroad Company shall have been extended westward so as to meet the line of said first named company, said first named company may extend their line of road eastward one hundred and fifty miles,* on the established route, so as to meet and connect with the line of the Union Pacific road, complying in all respects with the provisions and restrictions of this act as to said Union Pacific road, and upon doing so shall enjoy all the rights, privileges, and benefits conferred by this act on said Union Pacific Railroad Company.

Sec. 14, 1862, amended as to Sioux City Branch Road.

SEC. 17. *And be it further enacted*, That so much of section fourteen of said act as relates to a branch from Sioux City, be, and the same is hereby, amended so as to read as follows: That whenever a line of railroad shall be completed through the States of Iowa or Minnesota to Sioux City, such company, now organized or as may hereafter be organized under the laws of Iowa, Minnesota, Dakota, or Nebraska, as the President of the United States, by its request, may designate or approve for that purpose, shall construct and operate a line of railroad and telegraph from Sioux City, upon the most direct and practicable route, to such a point on, and so as to connect with, the Iowa branch of the Union Pacific Railroad from Omaha, or the Union Pacific Railroad, as such company may select, and on the same terms and conditions as are provided in this act and the act to which this is an amendment, for the construction of the said Union (and) Pacific Railroad and telegraph line and branches; and said company shall complete the same at the rate of fifty miles per year: *Provided*, That said Union Pacific Railroad Company shall be, and is hereby, released from the construction of said branch. And said company constructing said branch shall not be entitled to receive in bonds an amount larger than the said Union Pacific Railroad Company would be entitled to receive if it had constructed the branch under this act and the act to which this is an amendment; but said company shall be entitled to receive alternate sections of land for ten miles in width on each side of the same along the whole length of said branch: *And provided further*, That if a railroad should not be completed to Sioux City, across Iowa or Minnesota, within eighteen months from the date of this act, then said company designated by the President, as aforesaid, may commence, continue, and complete the construc-

*Amended by the act of July 3, 1866, so as to allow the Central Pacific to continue constructing eastward until it should meet the line of the Union Pacific.

tion of said branch as contemplated by the provisions of this act: *Provided, however*, That if the said company so designated by the President as aforesaid shall not complete the said branch from Sioux City to the Pacific Railroad within ten years from the passage of this act, then, and in that case, all the railroad which shall have been constructed by said company shall be forfeited to and become the property of the United States.

Burlington & M. R. R. Co. may extend road, &c.

SEC. 18. *And be it further enacted*, That the Burlington and Missouri River Railroad Company, a corporation organized under and by virtue of the laws of the state of Iowa, be, and hereby is, authorized to extend its road through the territory of Nebraska from the point where it strikes the Missouri river, south of the mouth of the Platte river, to some point not further west than the one hundredth meridian of west longitude, so as to connect, by the most practicable route, with the main trunk of the Union Pacific Railroad, or that part of it which runs from Omaha to the said one hundredth meridian of west longitude.* And for the purpose of enabling said Burlington and Missouri River Railroad Company to construct that portion of their road herein authorized, the right of way through the public lands is hereby granted to said company for the construction of said road. And the right, power, and authority is hereby given to said company to take from the public lands adjacent to the line of said road, earth, stone, timber, and other materials for the construction thereof. Said right of way is granted to said company to the extent of two hundred feet where it may pass over the public lands, including all necessary grounds for stations, buildings, work-shops, depots, machine-shops, switches, side-tracks, turn-tables, and water-stations. And the United States shall extinguish, as rapidly as may be, consistent with public policy and the welfare of the said Indians, the Indian titles to all lands falling under the operation of this section and required for the said right of way and grant of land herein made.

Right of way; &c.

U. S. to extinguish Indian titles.—Sec. 2, 1866.

Land grants to Burlington & M. R. R. Co.

SEC. 19. *And be it further enacted*, That for the purpose of aiding in the construction of said road, there be, and hereby is, granted to the said Burlington and Missouri River Railroad Company, every alternate section of public land (excepting mineral lands as provided in this act) designated by odd numbers, to the amount of ten alternate sections per mile on each side of said road, on the line thereof, and not sold, reserved, or otherwise disposed of by the United

* Act of May 6, 1870, authorizes connection to be made at or near the Fort Kearney reservation.

States, and to which a pre-emption or homestead claim may not have attached at the time the line of said road is definitely fixed: *Provided*, That said company shall accept this grant within one year from the passage of this act, by filing such acceptance with the Secretary of the Interior, and shall also establish the line of said road, and file a map thereof with the Secretary of the Interior within one year of the date of said acceptance, when the said Secretary shall withdraw the lands embraced in this grant from market.

Burlington & M.R.R.Co lands, &c.

SEC. 20. *And be it further enacted*, That whenever said Burlington and Missouri River Railroad Company shall have completed twenty consecutive miles of the road mentioned in the foregoing section, in the manner provided for other roads mentioned in this act and the act to which this is an amendment, the President of the United States shall appoint three commissioners to examine and report to him in relation thereto; and if it shall appear to him that twenty miles of said road have been completed as required by this act, then, upon certificate of said commissioners to that effect, patents shall issue conveying the right and title to said lands to said company on each side of said road, as far as the same is completed, to the amount aforesaid; and such examination, report, and conveyance, by patents, shall continue from time to time, in like manner, until said road shall have been completed. And the President shall appoint said commissioners, to fill vacancies in said commission, as provided in relation to other roads mentioned in the act to which this is an amendment. And the said company shall be entitled to all the privileges and immunities granted to the Hannibal and St. Joseph's Railroad Company by the said last mentioned act, so far as the same may be applicable: *Provided*, That no government bonds shall be issued to the said Burlington and Missouri River Railroad Company to aid in the construction of said extension of its road; and provided further, that said extension shall be completed within the period of ten years from the passage of this act.

Bonds.

Land not to be conveyed to any company until they pay cost of survey &c. Sec. 4, 1862. Sec. 6, 1864.

SEC. 21. *And be it further enacted*, That before any land granted by this act shall be conveyed to any company or party entitled thereto under this act, there shall first be paid into the Treasury of the United States the cost of surveying, selecting, and conveying the same by the said company, or party in interest as the titles shall be required by said company, which amount shall, without any further appropriation, stand to the credit of the proper account, to be used by the Commissioner of the General Land Office, for the prosecution of the survey of the public lands along the line of said

road, and so from year to year, until the whole shall be completed, as provided under the provisions of this act.*

SEC. 22. *And be it further enacted*, That Congress may at any time, alter, amend, or repeal this act. Sec. 18, 1864.

Approved July 2, 1864.

AMENDMENT OF MARCH 3, 1865.

AN ACT to amend an act entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the government the use of the same for postal, military, and other purposes," approved July first, eighteen hundred and sixty-two, and to amend an act amendatory thereof, approved July second, eighteen hundred and sixty-four. 13 Stat., 573.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section ten of said act of July second, eighteen hundred and sixty-four, be so modified and amended as to allow the Central Pacific Railroad Company, and the Western Pacific Railroad Company, of California, the Union Pacific Railroad Company, the Union Pacific Railroad Company, eastern division, and all other companies provided for in the said acts of the second of July, eighteen hundred and sixty-four, to issue their six per centum thirty years' bonds, interest payable in any lawful money of the United States, upon their separate roads. And the said companies are hereby authorized to issue, respectively, their bonds to the extent of one hundred miles in advance of a continuous completed line of construction. May issue bonds 100 miles in advance of completed line, interest payable in any lawful money. Sec. 10, 1864.

SEC. 2. *And be it further enacted*, That the assignment made by the Central Pacific Railroad Company of California to the Western Pacific Railroad Company of said state, of the right to construct all that portion of said railroad and telegraph from the city of San Jose to the city of Sacramento, is hereby ratified and confirmed to the said Western Pacific Railroad Company, with all the privileges and benefits of the several acts of Congress relating thereto, and subject to all the conditions thereof: *Provided*, That the Assignment confirmed to San Jose and Sacramento Road.

*In the act of July 15, 1870, which, among many other appropriations, contains those for the survey of the public lands within the limits of the grant of this company in Colorado, Wyoming, and Utah, it is "*Provided*, That the foregoing appropriations for the surveys of public lands within the limits of the Union Pacific Railroad Company's land grant shall be conditional upon the compliance of said company or party in interest with the requirements of the twenty-first section of the act of July second, eighteen hundred and sixty-four."

time within which the said Western Pacific Railroad Company shall be required to construct the first twenty miles of their said road shall be one year from the first day of July, eighteen hundred and sixty-five, and that the entire road shall be completed from San Jose to Sacramento, connecting at the latter point with the said Central Pacific Railroad, within four years thereafter.

Approved March 3, 1865.

AMENDMENT OF JULY 3, 1866.

14 Stat., 79. AN ACT to amend an act entitled "An act to amend an act entitled 'An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the government the use of the same for postal, military, and other purposes,' approved July first, eighteen hundred and sixty-two," approved July second, eighteen hundred and sixty-four.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Union Pacific Railway Company, eastern division, is hereby authorized to designate the general route of their said road, and to file a map thereof, as now required by law, at any time before the first day of December, eighteen hundred and sixty-six; and upon the filing of the said map, showing the general route of said road, the lands along the entire line thereof, so far as the same may be designated, shall be reserved from sale by order of the Secretary of the Interior: *Provided*, That said company shall be entitled to only the same amount of the bonds of the United States to aid in the construction of their line of railroad and telegraph as they would have been entitled to if they had connected their said line with the Union Pacific Railroad on the one hundredth degree of longitude, as now required by law: *And provided further*, That said company shall connect their line of railroad and telegraph with the Union Pacific Railroad, but not at a point more than fifty miles westwardly from the meridian of Denver in Colorado.

U. P. R. R. to proceed till met. SEC. 2. *And be it further enacted*, That the Union Pacific Railroad Company, with the consent and approval of the Secretary of the Interior, are hereby authorized to locate, construct, and continue their road from Omaha, in Nebraska territory, westward, according to the best and most practicable route and without reference to the initial point on the one hundredth meridian of west longitude, as now provided by law, in a continuous completed line, until they shall meet

and connect with the Central Pacific Railroad Company of California; and the Central Pacific Railroad Company of California, with the consent and approval of the Secretary of the Interior, are hereby authorized to locate, construct, and continue their road eastward, in a continuous completed line, until they shall meet and connect with the Union Pacific Railroad;* *Provided*, That each of the above named companies shall have the right, when the nature of the work to be done, by reason of deep cuts and tunnells, shall for the expeditious construction of the Pacific Railroad require it, to work for an extent of not to exceed three hundred miles in advance of their continuous completed line.

Central Pacific may continue their road eastward, with consent of Secretary of the Interior, till met by U. P. R. R. Co. Sec. 10, 1862, and sec. 16, 1864, amended.

Approved July 3, 1866.

AN ACT RELATING TO THE DENVER PACIFIC, MARCH 3, 1869.

AN ACT to authorize the transfer of lands granted to the Union Pacific Railway Company, Eastern Division, between Denver and the point of its connection with the Union Pacific Railway, to the Denver Pacific Railway and Telegraph Company, and to expedite the completion of railroads to Denver in the Territory of Colorado. 15 Stat., 324.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Union Pacific Railway Company, Eastern Division, be,

* The two companies having agreed in general terms upon the point of junction of the two roads, Congress passed [16 Stat., 121]—

AN ACT to fix the point of junction of the Union Pacific Railroad Company and the Central Pacific Railroad Company.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the common terminus and point of junction of the Union Pacific Railroad Company and the Central Pacific Railroad Company shall be definitely fixed and established on the line of railroad as now located and constructed, northwest of the station at Ogden, and within the limits of the sections of land hereinafter mentioned, viz., Section thirty-six of township seven, of range two, situate north and west of the principal meridian and base line in the territory of Utah, and sections twenty-five, twenty-six, and thirty-five of township seven, of range two and section six of township six, and sections thirty and thirty-one of township seven, of range one, and sections one and two of township six, of range two, all situate north and west of said principal meridian and base line; and said companies are hereby authorized to enter upon, use, and possess said sections, which are hereby granted to them in equal shares, with the same rights, privileges, and obligations now by law provided with reference to other lands granted to said railroads: *Provided, however*, That the Secretary of the Interior shall designate a section of land in said township seven, of range two, belonging to said companies, and reserve the same for the benefit of schools in said territory, in accordance with the act of February twenty-one, eighteen hundred and fifty-five, establishing the office of Surveyor-General of Utah, and to grant land for school and university purposes: *Provided, also*, That said companies shall pay for any additional lands acquired by this act at the rate of two dollars and fifty cents an acre: *And provided further*, That no rights of private persons shall be affected by this act.

Approved May 6, 1870.

and it hereby is authorized to contract with the Denver Pacific Railway and Telegraph Company, a corporation existing under the laws of the Territory of Colorado, for the construction, operation and maintenance of that part of its line of railroad and telegraph between Denver City and its point of connection with the Union Pacific Railroad, which point shall be at Cheyenne, and to adopt the road-bed already graded by said Denver Pacific Railway and Telegraph Company as said line, and to grant to said Denver Pacific Railway and Telegraph Company the perpetual use of its right of way and depot grounds, and to transfer to it all the rights and privileges, subject to all the obligations pertaining to said part of its line.

SEC. 2. *And be it further enacted*, That the said Union Pacific Railway Company, Eastern Division, shall extend its railroad and telegraph to a connection at the city of Denver, so as to form with that part of its line herein authorized to be constructed, operated and maintained by the Denver Pacific Railway and Telegraph Company, a continuous line of railroad and telegraph from Kansas City, by way of Denver, to Cheyenne. And all the provisions of law for the operation of the Union Pacific Railroad, its branches and connections, as a continuous line, without discrimination, shall apply the same as if the road from Denver to Cheyenne had been constructed by the said Union Pacific Railway Company, Eastern Division, but nothing herein shall authorize the said Eastern Division Company to operate the road or fix the rates of tariff for the Denver Pacific Railway and Telegraph Company.

SEC. 3. *And be it further enacted*, That said companies are hereby authorized to mortgage their respective portions of said road, as herein defined, for an amount not exceeding thirty-two thousand dollars per mile, to enable them respectively to borrow money to construct the same; and that each of said companies shall receive patents to the alternate sections of land along their respective lines of road, as herein defined, in like manner and within the same limits as is provided by law in the case of lands granted to the Union Pacific Railway Company, Eastern Division; *Provided*, That neither of the Companies hereinbefore mentioned shall be entitled to subsidy in United States bonds under provisions of this act.

Approved March 3, 1869.

JOINT RESOLUTION OF APRIL 10, 1869.

JOINT RESOLUTION for the protection of the interests of the United States in the Union Pacific Railroad Company, the Central Pacific Railroad Company, and for other purposes. 16 Stat., 56.

Be it resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the stockholders of the Union Pacific Railroad Company, at a meeting to be held on the twenty-second day of April, eighteen hundred and sixty-nine, at the city of Boston (with power to adjourn from day to day), shall elect a board of directors for the ensuing year; and said stockholders are hereby authorized to establish their general office at such place in the United States as they may select at said meeting: *Provided*, That the passage of this resolution shall not confer any other right upon said Union Pacific Railroad Company than to hold such election, or be held in any manner to relinquish or waive any rights of the United States to take advantage of any act or neglect of said Union Pacific Railroad Company heretofore done or omitted whereby the rights of the general government have been or may be prejudiced: *And provided further*, That the common terminus of the Union Pacific and the Central Pacific railroads shall be at or near Ogden: and the Union Pacific Railroad Company shall build, and the Central Pacific Railroad Company pay for and own, the railroad from the terminus aforesaid to Promontory Summit, at which point the rails shall meet and connect and form one continuous line.

Stockholders of Union Pacific R. R. Co. to elect a board of directors.

To establish their general office.

No other right conferred or waived hereby.

Common terminus of the Union Pacific and Central Pacific railroads to be at or near Ogden, &c.

SEC. 2. *And be it further resolved*, That to ascertain the condition of the Union Pacific Railroad and the Central Pacific Railroad, the President of the United States is authorized to appoint a board of eminent citizens, not exceeding five in number, and who shall not be interested in either road, to examine and report upon the condition of, and what sum or sums, if any, will be required to complete, each of said roads, for the entire length thereof, to the said terminus as a first-class railroad, in compliance with the several acts relating to said roads, and the expense of said board, including an allowance of ten dollars to each for their services for each day employed in such examination or report, to be paid equally by said companies.

The President to appoint a commission to examine and report upon the roads.

Expenses and pay of commissioners.

SEC. 3. *And be it further resolved*, That the President is hereby authorized and required to withhold from each of said companies an amount of subsidy bonds authorized to be issued by the United States under said acts sufficient to secure the full completion as a first-class road of all sections of such road upon which bonds have already been issued, or

Subsidy bonds to be withheld sufficient to secure the full completion, as a first-class road, of all sections of such road, &c.

in lieu of such bonds he may receive as such security an equal amount of the first mortgage bonds of such company; and if it shall appear to the President that the amount of subsidy bonds yet to be issued to either of said companies is insufficient to insure the full completion of such road, he may make requisition upon such company for a sufficient amount of bonds already issued to said company, or in his discretion of their first mortgage bonds, to secure the full completion of the same. And in default of obtaining such security as [is] in this section provided, the President may authorize and direct the Attorney-General to institute such suits and proceedings on behalf and in the name of the United States, in any court of the United States having jurisdiction, as shall be necessary or proper to compel the giving of such security, and thereby, or in any manner otherwise, to protect the interests of the United States in said road, and to insure the full completion thereof as a first-class road, as required by law and the statutes in that case made.

If the amount to be issued is insufficient, &c.

Attorney-General to institute necessary suits.

SEC. 4. *And be it further resolved*, That the Attorney-General of the United States be, and he is hereby, authorized and directed to investigate whether or not the charter and all the franchises of the Union Pacific Railroad Company and of the Central Pacific Railroad Company have not been forfeited, and to institute all necessary and proper legal proceedings; also, to investigate whether or not said companies have or have not made any illegal dividends upon their stock, and if so to institute the necessary proceedings to have the same reimbursed; and also to investigate whether any of the directors or any other agents or employés of said companies have or not violated any penal law, and if so to institute the proper criminal proceedings against all persons who have violated such laws.

Attorney-General to investigate whether the charter of the Union Pacific and Central Pacific railroads have not been forfeited, &c.

To institute criminal proceedings, if, &c.

Approved April 10, 1869.

ACT OF MARCH 3, 1871.

* * * * * * *

16 Stat., p. 525

SEC. 9. That, in accordance with the fifth section of the act approved July two, eighteen hundred and sixty four, entitled "An act to amend an act entitled 'An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific Ocean, and to secure to the government the use of the same for postal, military, and other purposes,' approved July first, eighteen hundred and

sixty two," the Secretary of the Treasury is hereby directed to pay over in money to the Pacific Railroad companies mentioned in said act, and performing services for the United States, one half of the compensation at the rate provided by law for such services, heretofore or hereafter rendered: *Provided*, That this section shall not be construed to affect the legal rights of the government or the obligations of the companies, except as herein specifically provided.

ACT OF MARCH 3, 1873.

AN ACT making appropriations for the legislative, executive, and judicial expenses of the government for the year ending June 30, 1874, and for other purposes. 17 Stat., 508.

* * * * * * *

Secretary of the Treasury to withhold payments to certain railroad companies for freight, &c.

SEC. 2. That the Secretary of the Treasury is directed to withhold all payments to any railroad company and its assigns, on account of freights or transportation over their respective roads, of any kind, to the amount of payments made by the United States for interest upon bonds of the United States issued to any such company, and which shall not have been reimbursed, together with the five per cent. of net earnings due and unapplied as provided by law: and any such company may bring suit in the court of claims to recover the price of such freight and transportation; and in such suit the right of such company to recover the same upon the law and the facts of the case shall be determined, and also the rights of the United States upon the merits of all the points presented by it in answer thereto by them, and either party to such suit may appeal to the supreme court; and both said courts shall give such cause or causes precedence of all other business.

Companies may bring suit in court of claims.

Appeal to supreme court. Causes to have precedence.

* * * * * * *

Attorney-General to bring suit in equity against the Union Pacific Railroad Company and all persons who, &c.

SEC. 4. That the Attorney-General shall cause a suit in equity to be instituted in the name of the United States against the Union Pacific Railroad Company, and against all persons who may, in their own names or through any agents, have subscribed for or received capital stock in said road, which stock has not been paid for in full in money, or who may have received, as dividends or otherwise, portions of the capital stock of said road, or the proceeds or avails thereof, or other property of said road, unlawfully and contrary to equity, or who may have received as profits or proceeds of contracts for construction or equipment of said

road, or other contracts therewith, moneys or other property which ought in equity to belong to said railroad corporation, or who may, under pretence of having complied with the acts to which this is an addition, have wrongfully and unlawfully received from the United States bonds, moneys, or lands which ought in equity to be accounted for and paid to said railroad company or to the United States, and to compel payment for said stock, and the collection and payment of such moneys, and the restoration of such property, or its value, either to said railroad corporation or to the United States, whichever shall in equity be held entitled thereto. Said suit may be brought in the circuit court in any circuit, and all said parties may be made defendants in one suit.

Suit to be brought in any circuit court.

Decrees.

Decrees may be entered and enforced against any one or more parties defendant without awaiting the final determination of the cause against other parties. The court where said cause is pending may make such orders and decrees and issue such process as it shall deem necessary to bring in new parties or the representatives of parties deceased, or to carry into effect the purposes of this act. On filing the bill, writs of subpœna may be issued by said court against any parties defendant, which writ shall run into any district, and shall be served, as other like process, by the marshal of such district. The books, records, correspondence, and all other documents of the Union Pacific Railroad Company, shall at all times be open to inspection by the Secretary of the Treasury, or such persons as he may delegate for that purpose. The laws of the United States providing for proceedings in bankruptcy shall not be held to apply to said corporation. No dividend shall hereafter be made by said company but from the actual net earnings thereof; and no new stock shall be issued, or mortgages or pledges made on the property or future earnings of the company, without leave of Congress, except for the purpose of funding and securing debt now existing, or the renewals thereof. No director or officer of said road shall hereafter be interested, directly or indirectly, in any contract therewith, except for his lawful compensation as such officer. Any director or officer who shall pay or declare, or aid in paying or declaring, any dividend, or creating any mortgage or pledge prohibited by this act, shall be punished by imprisonment not exceeding two years, and by fine not exceeding five thousand dollars. The proper circuit court of the United States

New parties, &c.

Writs of subpœna to run into any district, and how served.

Books of the railroad company to be open to inspection.

Bankrupt laws not to apply.

Dividends, new stock, mortgages, &c.

No director to be interested in any contract, except, &c.

Penalty.

shall have jurisdiction to hear and determine all cases of mandamus to compel said Union Pacific Railroad Company to operate its road as required by law. Jurisdiction of circuit court to issue mandamus.

Approved March 3, 1873.

ACT OF JUNE 20, 1874.

AN ACT making additions to the fifteenth section of the act approved July 2, 1864, entitled "An act to amend an act entitled 'An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the government the use of the same for postal, military, and other purposes,' approved July 1, 1862." 18 Stat., 111.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there shall be, and is hereby, added to the fifteenth section of the act approved July second, eighteen hundred and sixty-four, entitled "An act to amend an act entitled 'An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the government the use of the same for postal, military, and other purposes,' approved July first, eighteen hundred and sixty-two," the following words, namely: "And any officer or agent of the companies authorized to construct the aforesaid roads, or of any company engaged in operating either of said roads, who shall refuse to operate and use the road or telegraph under his control, or which he is engaged in operating for all purposes of communication, travel, and transportation, so far as the public and the government are concerned, as one continuous line, or shall refuse, in such operation and use, to afford and secure to each of said roads equal advantages and facilities as to rates, time, or transportation, without any discrimination of any kind in favor of, or adverse to, the road or business of any or either of said companies, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined in any sum not exceeding one thousand dollars, and may be imprisoned not less than six months. In case of failure or refusal of the Union Pacific Railroad Company, or either of said branches, to comply with the requirements of this act and the acts to which this act is amendatory, the party injured or the company aggrieved may bring an action in the district or circuit court of the United States, in the territory, district, or circuit in which any portion of the road of the defendant may be

Certain road to be operated as continuous line with equal facilities.

Agents or officers to be fined in case of refusal.

Union Pacific Company to be sued in case of refusal.

situated, for damages on account of such failure or refusal; and, upon recovery, the plaintiff shall be entitled to judgment for treble the amount of all excess of freight and fares collected by the defendant, and for treble the amount of damages sustained by the plaintiff by such failure or refusal; and for each and every violation of or failure to comply with the requirements of this act, a new cause of action shall arise; and in case of suit in any such territory, district, or circuit, process may be served upon any agent of the defendant found in the territory, district, or circuit in which such suit may be brought, and such service shall be by the court held to be good and sufficient; and it is hereby provided that for all the purposes of said act, and of the acts amendatory thereof, the railway of the Denver Pacific Railway and Telegraph Company shall be deemed and taken to be a part and extension of the road of the Kansas Pacific Railroad, to the point of junction thereof with the road of the Union Pacific Railroad Company at Cheyenne, as provided in the act of March third, eighteen hundred and sixty-nine.

Penalty fixed.

Approved June 20, 1874.

ACT OF JUNE 22, 1874.

18 Stat., 200.

AN ACT providing for the collection of moneys due the United States from the Pacific Railroad Companies.

Secretary of the Treasury to demand five per cent. of net earnings.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Treasury be, and hereby is, directed to require payment of the railroad companies, their successors and assigns, or the successors or assigns of any or either of said companies, of all sums of money due, or to become due, the United States for the five per centum of the net earnings provided for by the act entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the government the use of the same for postal, military, and other purposes," approved July first, eighteen hundred and sixty-two, or by any other act or acts in relation to the companies therein named, or any other such company or companies; and in case either of said railroad companies shall neglect or refuse to pay the same within sixty days after demand therefor made upon the treasurer of such railroad company, the secretary of the treasury shall certify that fact to the Attorney-General, who shall thereupon institute the neces-

Attorney-General to bring suit.

sary suits and proceedings to collect, and otherwise obtain redress in respect of the same, in the proper circuit courts of the United States, and prosecute the same, with all convenient dispatch, to a final determination.

Approved June 22, 1874.

ACT OF MAY 7, 1878.

CHAP. 96.—An act to alter and amend the act entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military, and other purposes," approved July first, eighteen hundred and sixty-two, and also to alter and amend the act of Congress approved July second, eighteen hundred and sixty-four, in amendment of said first-named act. 20 Stat., 56.

Whereas, on the first day of July, anno Domini eighteen hundred and sixty-two, Congress passed an act entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military, and other purposes;" and

Whereas afterward, on the second day of July, anno Domini eighteen hundred and sixty-four, Congress passed an act in amendment of said first-mentioned act; and

Whereas the Union Pacific Railroad Company, named in said acts, and under the authority thereof, undertook to construct a railway, after the passage thereof, over some part of the line mentioned in said acts; and

Whereas, under the authority of the said two acts, the Central Pacific Railroad Company of California, a corporation existing under the laws of the State of California, undertook to construct a railway, after the passage of said acts, over some part of the line mentioned in said acts; and

Whereas the United States, upon demand of said Central Pacific Railroad Company, have heretofore issued, by way of loan and as provided in said acts, to and for the benefit of said company, in aid of the purposes named in said acts, the bonds of the United States, payable in thirty years from the date thereof, with interest at six per centum per annum, payable half yearly, to the amount of twenty-five million eight hundred and eighty-five thousand one hundred and twenty dollars, which said bonds have been sold in the market or otherwise disposed of by said company; and

Whereas the said Central Pacific Company has issued and disposed of an amount of its own bonds equal to the amount

so issued by the United States, and secured the same by mortgage, and which are, if lawfully issued and disposed of, a prior and paramount lien, in the respect mentioned in said acts, to that of the United States, as stated, and secured thereby; and

Whereas, after the passage of said acts, the Western Pacific Railroad Company, a corporation then existing under the laws of California, did, under the authority of Congress, become the assignee of the rights, duties and obligations of the said Central Pacific Railroad Company, as provided in the act of Congress passed on the third of March, anno Domini eighteen hundred and sixty-five, and did, under the authority of the said act and of the acts aforesaid, construct a railroad from the city of San Jose to the city of Sacramento, in California, and did demand and receive from the United States the sum of one million nine hundred and seventy thousand five hundred and sixty dollars of the bonds of the United States, of the description before mentioned as issued to the Central Pacific Company, and in the same manner and under the provisions of said acts; and upon and in respect of the bonds so issued to both said companies, the United States have paid interest to the sum of more than thirteen and a half million dollars, which has not been reimbursed; and

Whereas said Western Pacific Railroad Company has issued and disposed of an amount of its own bonds equal to the amount so issued by the United States to it, and secured the same by mortgage, which are, if lawfully issued and disposed of, a prior and paramount lien to that of the United States, as stated and secured thereby; and

Whereas said Western Pacific Railroad Company has since become merged in, and consolidated with, said Central Pacific Railroad Company, under the name of the Central Pacific Railroad Company, whereby the said Central Pacific Railroad Company has become liable to all the burdens, duties, and obligations before resting upon said Western Pacific Railroad Company; and divers other railroad companies have been merged in and consolidated with said Central Pacific Railroad Company; and

Whereas the United States, upon the demand of the said Union Pacific Railroad Company, have heretofore issued by way of loan to it and as provided in said acts, the bonds of the United States, payable in thirty years from the date thereof, with interest at six per centum per annum, payable half-yearly, the principal sums of which amount to twenty-seven million two hundred and thirty-six thousand

five hundred and twelve dollars; on which the United States have paid over ten million dollars interest over and above all reimbursements; which said bonds have been sold in the market or otherwise disposed of by said corporation; and

Whereas said corporation has issued and disposed of an amount of its own bonds equal to the amounts so issued to it by the United States as aforesaid, and secured the same by mortgage, and which are, if lawfully issued and disposed of, a prior and paramount lien, in the respect mentioned in said acts, to that of the United States, as stated, and secured thereby; and

Whereas the total liabilities (exclusive of interest to accrue) to all creditors, including the United States, of the said Central Pacific Company, amount in the aggregate to more than ninety-six million dollars, and those of the said Union Pacific Railroad Company to more than eighty-eight million dollars; and

Whereas the United States, in view of the indebtedness and operations of said several railroad companies respectively, and of the disposition of their respective incomes, are not and cannot, without further legislation, be secure in their interests in and concerning said respective railroads and corporations, either as mentioned in said acts or otherwise; and

Whereas a due regard to the rights of said several companies respectively, as mentioned in said act of eighteen hundred and sixty-two, as well as just security to the United States in the premises, and in respect of all the matters set forth in said act, require that the said act of eighteen hundred and sixty-two be altered and amended as hereinafter enacted; and

Whereas, by reason of the premises also, as well as for other causes of public good and justice, the powers provided and reserved in said act of eighteen hundred and sixty-four for the amendment and alteration thereof ought also to be exercised as hereinafter enacted: Therefore,

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the net earnings mentioned in said act of eighteen hundred and sixty-two, of said railroad companies respectively, shall be ascertained by deducting from the gross amount of their earnings respectively the necessary expenses actually paid within the year in operating the same and keeping the same in a state of repair, and also the sum paid by them respectively within the year in discharge of interest on their first mortgage bonds, whose lien has priority over the lien of the

United States, and excluding from consideration all sums owing or paid by said companies respectively for interest upon any other portion of their indebtedness; and the foregoing provision shall be deemed and taken as an amendment of said act of eighteen hundred and sixty-four, as well as of said act of eighteen hundred and sixty-two. This section shall take effect on the thirtieth day of June next, and be applicable to all computations of net earnings thereafter; but it shall not affect any right of the United States or of either of said railroad companies existing prior thereto.

SEC. 2. That the whole amount of compensation which may, from time to time, be due to said several railroad companies respectively for services rendered for the Government shall be retained by the United States, one-half thereof to be presently applied to the liquidation of the interest paid and to be paid by the United States upon the bonds so issued by it as aforesaid, to each of said corporations severally, and the other half thereof to be turned into the sinking-fund hereinafter provided, for the uses therein mentioned.

SEC. 3. That there shall be established in the Treasury of the United States a sinking fund, which shall be invested by the Secretary of the Treasury in bonds of the United States; and the semi-annual income thereof shall be in like manner from time to time invested, and the same shall accumulate and be disposed of as hereinafter mentioned. And in making such investments the Secretary shall prefer the five per centum bonds of the United States, unless, for good reasons appearing to him, and which he shall report to Congress, he shall at any time deem it advisable to invest in other bonds of the United States. All the bonds belonging to said fund shall, as fast as they shall be obtained, be so stamped as to show that they belong to said fund, and that they are not good in the hands of other holders than the Secretary of the Treasury, until they shall have been indorsed by him, and publicly disposed of pursuant to this act.

SEC. 4. That there shall be carried to the credit of the said fund, on the first day of February in each year, the one-half of the compensation for services hereinbefore named, rendered for the Government by said Central Pacific Railroad Company, not applied in liquidation of interest; and, in addition thereto, the said company shall, on said day in each year, pay into the Treasury, to the credit of said sinking-fund, the sum of one million two hundred thousand dollars, or so much thereof as shall be necessary to make the five per centum of the net earnings of its said road payable to the United States under said act of eight-

een hundred and sixty-two, and the whole sum earned by it as compensation for services rendered for the United States, together with the sum by this section required to be paid, amount in the aggregate to twenty-five per centum of the whole net earnings of said railroad-company, ascertained and defined as hereinbefore provided, for the year ending on the thirty-first day of December next preceding. That there shall be carried to the credit of the said fund, on the first day of February in each year, the one-half of the compensation for services hereinbefore named, rendered for the Government by said Union Pacific Railroad Company, not applied in liquidation of interest; and, in addition thereto, the said company shall, on said day in each year, pay into the Treasury, to the credit of said sinking-fund, the sum of eight hundred and fifty thousand dollars, or so much thereof as shall be necessary to make the five per centum of the net earnings of its said road payable to the United States under said act of eighteen hundred and sixty-two, and the whole sum earned by it as compensation for services rendered for the United States, together with the sum by this section required to be paid, amount in the aggregate to twenty five per centum of the whole net earnings of said railroad company, ascertained and defined as hereinbefore provided, for the year ending on the thirty-first day of December next preceding.

SEC. 5. That whenever it shall be made satisfactorily to appear to the Secretary of the Treasury, by either of said companies, that seventy-five per centum of its net earnings as hereinbefore defined, for any current year are or were insufficient to pay the interest for such year upon the obligations of such company, in respect of which obligations there may exist a lien paramount to that of the United States, and that such interest has been paid out of such net earnings, said Secretary is hereby authorized, and it is made his duty, to remit for such current year so much of the twenty-five per centum of net earnings required to be paid into the sinking fund, as aforesaid, as may have been thus applied and used in the payment of interest as aforesaid.

SEC. 6. That no dividend shall be voted, made, or paid for or to any stockholder or stockholders in either of said companies respectively at any time when the said company shall be in default in respect of the payment either of the sums required as aforesaid to be paid into said sinking-fund, or in respect of the payment of the said five per centum of the net earnings, or in respect of interest upon

any debt the lien of which, or of the debt on which it may accrue, is paramount to that of the United States; and any officer or person who shall vote, declare, make, or pay, and any stockholder of any of said companies who shall receive any such dividend contrary to the provisions of this act, shall be liable to the United States for the amount thereof, which, when recovered, shall be paid into said sinking-fund. And every such officer, person, or stockholder who shall knowingly vote, declare, make, or pay any such dividend, contrary to the provisions of this act, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding ten thousand dollars, and by imprisonment not exceeding one year.

SEC. 7. That the said sinking-fund so established and accumulated shall, at the maturity of said bonds so respectively issued by the United States, be applied to the payment and satisfaction thereof, according to the interest and proportion of each of said companies in said fund, and of all interest paid by the United States thereon, and not reimbursed, subject to the provisions of the next section.

SEC. 8. That said sinking-fund so established and accumulated shall, according to the interest and proportion of said companies respectively therein, be held for the protection, security, and benefit of the lawful and just holders of any mortgage or lien debts of such companies respectively, lawfully paramount to the rights of the United States, and for the claims of other creditors, if any, lawfully chargeable upon the funds so required to be paid into said sinking-fund, according to their respective lawful priorities, as well as for the United States, according to the principles of equity, to the end that all persons having any claim upon said sinking-fund may be entitled thereto in due order; but the provisions of this section shall not operate or be held to impair any existing legal right, except in the manner in this act provided, of any mortgage, lien, or other creditor of any of said companies respectively, nor to excuse any of said companies respectively from the duty of discharging, out of other funds, its debts to any creditor except the United States.

SEC. 9. That all sums due to the United States from any of said companies respectively, whether payable presently or not, and all sums required to be paid to the United States or into the Treasury, or into said sinking-fund under this act, or under the acts hereinbefore referred to, or otherwise, are hereby declared to be a lien upon all the property, estate, rights, and franchises of every description granted

or conveyed by the United States to any of said companies respectively or jointly, and also upon all the estate and property, real, personal, and mixed, assets, and income of the said several railroad companies respectively, from whatever source derived, subject to any lawfully prior and paramount mortgage, lien, or claim thereon. But this section shall not be construed to prevent said companies respectively from using and disposing of any of their property or assets in the ordinary, proper and lawful course of their current business, in good faith and for valuable consideration.

SEC. 10. That it is hereby made the duty of the Attorney-General of the United States to enforce, by proper proceeding against the several railroad companies respectively or jointly, or against either of them, and others, all the rights of the United States under this act and under the acts hereinbefore mentioned, and under any other act of Congress or right of the United States; and in any suit or proceeding already commenced, or that may be hereafter commenced, against any of said companies, either alone or with other parties, in respect of matters arising under this act, or under the acts or rights hereinbefore mentioned or referred to, it shall be the duty of the court to determine the very right of the matter without regard to matters of form, joinder of parties, multifariousness, or other matters not affecting the substantial rights and duties arising out of the matters and acts hereinbefore stated and referred to.

SEC. 11. That if either of said railroad companies shall fail to perform all and singular the requirements of this act and of the acts hereinbefore mentioned, and of any other act relating to said company, to be by it performed, for the period of six months next after such performance may be due, such failure shall operate as a forfeiture of all the rights, privileges, grants, and franchises derived or obtained by it from the United States; and it shall be the duty of the Attorney-General to cause such forfeiture to be judicially enforced.

SEC. 12. That nothing in this act shall be construed or taken in any wise to affect or impair the right of Congress at any time hereafter further to alter, amend, or repeal the said acts hereinbefore mentioned; and this act shall be subject to alteration, amendment, or repeal, as, in the opinion of Congress, justice or the public welfare may require. And nothing herein contained shall be held to deny, exclude, or impair any right or remedy in the premises now existing in favor of the United States.

SEC. 13. That each and every of the provisions in this act contained shall severally and respectively be deemed, taken, and held as in alteration and amendment of said act of eighteen hundred and sixty-two and of said act of eighteen hundred and sixty-four respectively, and of both said acts.

Approved, May 7, 1878.

ACT OF JUNE 19, 1878.

20 Stat. 169.

CHAP. 316.—An act to create an Auditor of Railroad Accounts and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section twenty of the act entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the government the use of the same for postal, military, and other purposes", approved July first, anno Domini eighteen hundred and sixty two, and the act entitled "An act relative to filing reports of railroad companies" approved June twenty-fifth, anno Domini eighteen hundred and sixty eight, be, and the same are hereby, repealed.

SEC 2. That the office of Auditor of Railroad Accounts is hereby established as a bureau of the Interior Department. The said Auditor shall be appointed by the President of the United States, by and with the advice and consent of the Senate. The annual salary of the said Auditor shall be, and is hereby, fixed at the sum of five thousand dollars. To assist the said Auditor to perform the duties of said office, the Secretary of the Interior shall appoint one bookkeeper at an annual salary of two thousand four hundred dollars, one assistant bookkeeper at an annual salary of two thousand dollars, one clerk at an annual salary of one thousand four hundred dollars, and one copyist at an annual salary of nine hundred dollars. Actual and necessary traveling and other expenses incurred in visiting the offices of the railroad companies hereinafter described, and for which vouchers shall be rendered, are hereby allowed, not to exceed the sum of two thousand dollars per annum; and it is hereby specially provided that each of said railroad companies shall furnish transportation over its own road, without expense to the United States, for the said Auditor or any person acting under his direction. Incidental expenses for books, stationery, and other material necessary for the use of said bureau are hereby allowed not

to exceed the sum of seven hundred dollars per annum. And the sum of twelve thousand dollars is hereby appropriated for the uses and purposes of this act for the fiscal year ending June thirtieth, anno Domini eighteen hundred and seventy-nine.

SEC. 3 That the duties of the said Auditor, under and subject to the direction of the Secretary of the Interior, shall be, to prescribe a system of reports to be rendered to him by the railroad companies whose roads are in whole or in part west, north, or south of the Missouri River, and to which the United States have granted any loan of credit or subsidy in bonds or lands; to examine the books and accounts of each of said railroad companies once in each fiscal year, and at such other times as may be deemed by him necessary to determine the correctness of any report received from them; to assist the government directors of any of said railroad companies in all matters which come under their cognizance whenever they may officially request such assistance; to see that the laws relating to said companies are enforced; to furnish such information to the several departments of the government in regard to tariffs for freight and passengers and in regard to the accounts of said railroad companies as may be by them required, or, in the absence of any request therefor, as he may deem expedient for the interest of the government; and to make an annual report to the Secretary of the Interior, on the first day of November, on the condition of each of said railroad companies, their road, accounts, and affairs, for the fiscal year ending June thirtieth immediately preceding.

SEC 4. That each and every railroad company aforesaid which has received from the United States any bonds of the said United States, issued by way of loan to aid in constructing or furnishing its road, or which has received from the United States any lands granted to it for a similar purpose, shall make to the said Auditor any and all such reports as he may require from time to time and shall submit its books and records to the inspection of said Auditor or any person acting in his place and stead, at any time that the said Auditor may request, in the office where said books and records are usually kept; and the said Auditor, or his authorized representative, shall make such transcripts from the said books and records as he may desire.

SEC. 5 That if any railroad company aforesaid shall neglect or refuse to make such reports as may be called for, or refuse to submit its books and records to inspection, as provided in section four of this act, such neglect or refusal shall

operate as a forfeiture, in each case of such neglect or refusal, of a sum not less than one thousand nor more than five thousand dollars, to be recovered by the Attorney-General of the United States in the name and for the use and benefit of the United States; and it shall be the duty of the Secretary of the Interior, in all such cases of neglect or refusal as aforesaid, to inform the Attorney-General of the facts, to the end that such forfeiture or forfeitures may be judicially enforced.

SEC. 6. This act shall apply to any and all persons or corporations into whose hands either of said railroads may lawfully come, as well as to the original companies.

SEC 7. This act shall take effect on and after the first day of July, anno Domini eighteen hundred and seventy-eight.

Approved, June 19, 1878.

In the Supreme Court of the United States.

Oct. Term 1878

No. 418

THE UNITED STATES

against

THE KANSAS PACIFIC RAILWAY COMPANY.

BRIEF OF J. P. USHER FOR DEFENDANT.

Judd & Detweiler, Printers.

Supreme Court of the United States.

THE UNITED STATES

against

THE KANSAS PACIFIC RAILWAY COMPANY.

This suit at law was brought in the United States circuit court for the district of Kansas to recover from the defendant certain moneys alleged to be due the United States on account of bonds amounting to $6,303,000, issued by the United States to the defendant pursuant to acts of Congress of July 1, 1862, and July 2, 1864. Judgment was rendered for the defendant in the circuit court, and the cause has been brought by writ of error to this Court.

For convenience, and to avoid confusion, the claim will be considered under the several acts of Congress, *seriatim*.

I.

The Act of July 1, 1862.

In considering this act it is believed that sections five, six, and twenty of the act embrace all of the contract and the law necessary to be directly noticed. For convenience those sections are printed.

SEC. 5. *And be it further enacted*, That for the purposes herein mentioned, the Secretary of the Treasury shall, upon the certificate in writing of said commissioners of the completion and equipment of forty consecutive miles of said railroad and telegraph, in accordance with the provisions of this act, issue to said company bonds of the United States of one thousand dollars each, payable in thirty years after date, bearing six per centum per annum interest, (said interest payable semi-annually,) which interest may

be paid in United States Treasury notes or any other money or currency which the United States have or shall declare lawful money and a legal tender, to the amount of sixteen of said bonds per mile for such section of forty miles; and to secure the repayment to the United States, as hereinafter provided, of the amount of said bonds so issued and delivered to said company, together with all interest thereon which shall have been paid by the United States, the issue of said bonds and delivery to the company shall *ipso facto* constitute a first mortgage on the whole line of the railroad and telegraph, together with the rolling-stock, fixtures, and property of every kind and description, and in consideration of which said bonds may be issued; and on refusal or failure of said company to redeem said bonds or any part of them, when required to do so by the Secretary of the Treasury, in accordance with the provisions of this act, the said road, with all the rights, functions, immunities, and appurtenances thereunto belonging, and also all lands granted to the said company by the United States, which, at the time of said default, shall remain in the ownership of the said company, may be taken possession of by the Secretary of the Treasury for the use and benefit of the United States: *Provided*, This section shall not apply to that part of any road now constructed.

SEC. 6. *And be it further enacted*, That the grants aforesaid are made upon condition that said company shall pay said bonds at maturity, and shall keep said railroad and telegraph line in repair and use, and shall at all times transmit dispatches over said telegraph line, and transport mails, troops, and munitions of war, supplies, and public stores upon said railroad for the Government whenever required to do so by any department thereof, and that the Government shall at all times have the preference in the use of the same for all the purposes aforesaid, (at fair and reasonable rates of compensation, not to exceed the amounts paid by private parties for the same kind of service;) and all compensation for services rendered for the Government shall be applied to the payment of said bonds and interest until the whole amount is fully paid. Said company may also pay the United States, wholly or in part, in the same or other bonds, Treasury notes, or other evidences of debt against the United States, to be allowed at par; and after said road is completed, until said bonds and interest are paid, at least five per centum of the net earnings of said road shall also be annually applied to the payment thereof. * * *

SEC. 20. *And be it further enacted*, That the corporation hereby created and the roads connected therewith, under the provisions of this act, shall make to the Secretary of the Treasury an annual report, wherein shall be set forth:

First. The names of the stockholders and their places of residence, so far as the same can be ascertained.

Second. The names and residences of the directors and all other officers of the company.

Third. The amount of stock subscribed, and the amount thereof actually paid in.

Fourth. A description of the lines of road surveyed, of the lines thereof fixed upon for the construction of the road, and the cost of such surveys.

Fifth. The amount received from passengers on the road.

Sixth. The amount received for freight thereon.

Seventh. A statement of the expense of said road and its fixtures.

Eighth. A statement of the indebtedness of said company, setting forth the various kinds thereof; which report shall be sworn to by the president of the said company, and shall be presented to the Secretary of the Treasury on or before the first day of July in each year.

Approved July 1, 1862.

The action is brought upon the last clause of the sixth section, which reads: "And after said road is completed, until said bonds and interest are paid, *at least* five per centum of the *net earnings* of said road shall also be annually applied to the payment thereof."

This act makes no provision for, neither does it contemplate that any suit at law or in equity should be brought for the recovery of principal or interest of bonds issued to the company. The way and manner of payment of both principal and interest was fully and specifically provided in the act. By section six, during the time the bonds were passing to maturity, the payments to be made were to consist in the charges for transmitting dispatches over the telegraph line and the transportation of mails, troops, and munitions of war, supplies, and public stores upon the railroad for the United States upon the requisition of any department of the Government, and the annual payment, after the road was completed, of the five per cent. net earnings of the railroad; and that there might be no difficulty in stating the account from which the five per cent. should be ascertained, certain provisions of the twentieth section were enacted.

By reference to the 5th, 6th, 7th, and 8th subdivisions of the section it will be seen that Congress intended that from the annual report to be made, the Secretary of the Treasury could easily determine the amount of the annual net earnings of the company. The report was to contain the amount received from passengers, the amount received for freight, a statement of the expenses, and a statement of the indebtedness of the company, setting forth the various kinds thereof. Unquestionably it was the intention of Congress to make—and it did make by the provisions of the 20th section referred to—ample provision to enable the Secretary to state the net earnings of the company. When stated, it became a debt obligatory upon the company to pay; and by the 5th section, if the company refused or failed to pay, or, in

equivalent words, "to redeem said bonds or any part of them when required to do so by the Secretary of the Treasury in accordance with the provisions of this act, the said road, with all its rights, functions, immunities, and appurtenances thereto belonging, and also all lands granted to the said company by the United States, which at the time of said default shall remain in the ownership of the said company, may (shall) be taken possession of by the Secretary of the Treasury for the use and benefit of the United States." It is a well-established rule of construction that where the word *may* is used in a statute it means *shall*, where the act to be done is by a public officer and concerns a public interest. (By Chancellor Kent: Newburgh Turnpike Co. *vs.* Miller, 5 Johns, ch. 113.)

It is all the time to be borne in mind that we are considering a contract as well as a law. As a contract, we are to try and ascertain what the parties to it understood the meaning of it to be; whether it was a contract that provided for its own execution by the parties represented by their agents, or whether it was an agreement only to be enforced through the instrumentality of the courts. That it was the former there can be no doubt. The act was passed in the midst of war waged for the preservation of the Government, and was in its terms, and by the decision of this court, in Union Pacific *vs.* U. S., 91 U. S., 72, declared to be a war measure. One mode of paying the debt was by transportation of mails, troops, and munitions of war for the United States. If the company should fail or refuse to do that, power was conferred upon the Secretary of the Treasury to seize the road, the same as for failure to pay the five per cent.

The idea that it was the intention of the parties that any time was to be taken, or any disputes permitted, in ascertaining what the net earnings were, cannot be tolerated. The five per cent. was to be annually paid, and if the contract left it to the company to dispute what the net earnings were after the president should have made his sworn statement,

as provided in section 20, years might elapse before that dispute would be ended, and then probably only at the end of a lawsuit. The contract is not to be construed in that way. It is a statute contract, and the statute has provided the only remedy for its enforcement.

The rule of law in all such cases is that the enforcement of statutory contracts, which specifically prescribe the mode of enforcement, must be sought in the way pointed out by the statute, and not otherwise.

Conwell's case, 2 Indiana, 588.
Kimble's case, 1 Indiana, 285.
2 Abbott's U. S. C. Ct., 108–109.

True, these were cases arising under the exercise of the right of eminent domain and of the taxing power.

In the case of the State of Maryland *vs.* The Baltimore and Ohio R. R. Co., 3 Howard, 534, it was decided that a clause of forfeiture in a law is to be construed differently from a similar clause in an engagement between individuals. The legislature can impose it as a punishment, but individuals can only make it a matter of contract; and in Taylor *vs.* Carondelet, 22 Mo., 111, it is decided that a forfeiture to the public, created by statute, in the nature of a penalty, cannot be relieved against in equity.

And in the case of Murray's Lessee, 18 Howard, 272, it was decided that Congress might provide by law for the ascertainment and recovery of balances due to the Government from a collector of customs, and by summary means compel the payment by such officers, and in case of their default their sureties to pay such balances.

The compensation for the transmitting of despatches and the transportation of troops, &c., it is positively declared by the 6th section of the act, shall be applied to the payment of the bonds. If the company should refuse to perform such service, can it be said that the only remedy the United States had was to be obtained at the end of a lawsuit? And

is there any reason for drawing any distinction between the payment by transportation services and by the five per cent? Could the road be seized for the non-payment of the one and not for the other?

Upon this branch of the argument there only remains to be noticed, informally, at this time, the 8th subdivision of section 20, which requires "a statement of the indebtedness of the company setting forth the various kinds thereof." Manifestly, the object of this clause was to enable its secretary, in stating the account, to take into consideration such indebtedness, and to deduct the same, with the expense of the road and fixtures, mentioned in the 7th clause, from the gross receipts of the road. Whether the whole indebtedness, or the interest upon such indebtedness, if it should appear to be a funded debt, should be deducted, would depend upon the nature and character of such indebtedness, for the various kinds thereof were to be specified; and though the secretary might make a mistake in that respect, yet it is not to be assumed that he would. But, whether or not, it has been the law since 1817, that all accounts of or with the United States shall be settled and adjusted in the Department of the Treasury. The statute is inexorable on this point.

The conclusion necessarily reached, upon examination of the act of 1862, is that an action at law cannot be maintained or set-off allowed for the recovery of the five per cent., that act having specifically provided the way and means of compelling the payment thereof. No other can be resorted to.

II.

The Rights and Obligations of the Parties under the Act of July 2, 1864.

There is nothing in this act changing or modifying the remedies of the Government for compelling payment of the

bonds, but questions do arise, and must necessarily be considered, whether and to what extent the Government released to the companies any of the obligations imposed upon them by the act of 1862. The claim of the company is that in several particulars releases and modifications of the obligations imposed by the act of 1862 were made by the act of 1864. Some of the more notable, affecting the bonded debt, will be pointed out.

First. Section 7 repeals the provision in section 17 of the act of 1862, providing for a reservation of a portion of the bonds until the road should be completed.

Second. By section 10 radical and important changes are made. It is as follows:

SEC. 10. *And be it further enacted*, That section five of said act be so modified and amended that the Union Pacific Railroad Company, the Central Pacific Railroad Company, and any other company authorized to participate in the construction of said road, may, on the completion of each section of said road, as provided in this act and the act to which this is an amendment, issue their first mortgage bonds on their respective railroad and telegraph lines to an amount not exceeding the amount of the bonds of the United States, and of even tenor and date, time of maturity, rate and character of interest, with the bonds authorized to be issued to said railroad companies respectively. And the lien of the United States bonds shall be subordinate to that of the bonds of any or either of said companies hereby authorized to be issued on their respective roads, property, and equipments, except as to the provisions of the sixth section of the act to which this act is an amendment, relating to the transmission of dispatches and the transportation of mails, troops, munitions of war, supplies, and public stores for the Government of the United States. And said section is further amended by striking out the word "forty," and inserting in lieu thereof the words "on each and every section of not less than twenty."

This action authorized the companies to issue a first mort-

is there any reason for drawing any distinction between the payment by transportation services and by the five per cent? Could the road be seized for the non-payment of the one and not for the other?

Upon this branch of the argument there only remains to be noticed, informally, at this time, the 8th subdivision of section 20, which requires "a statement of the indebtedness of the company setting forth the various kinds thereof." Manifestly, the object of this clause was to enable its secretary, in stating the account, to take into consideration such indebtedness, and to deduct the same, with the expense of the road and fixtures, mentioned in the 7th clause, from the gross receipts of the road. Whether the whole indebtedness, or the interest upon such indebtedness, if it should appear to be a funded debt, should be deducted, would depend upon the nature and character of such indebtedness, for the various kinds thereof were to be specified; and though the secretary might make a mistake in that respect, yet it is not to be assumed that he would. But, whether or not, it has been the law since 1817, that all accounts of or with the United States shall be settled and adjusted in the Department of the Treasury. The statute is inexorable on this point.

The conclusion necessarily reached, upon examination of the act of 1862, is that an action at law cannot be maintained or set-off allowed for the recovery of the five per cent., that act having specifically provided the way and means of compelling the payment thereof. No other can be resorted to.

II.

The Rights and Obligations of the Parties under the Act of July 2, 1864.

There is nothing in this act changing or modifying the remedies of the Government for compelling payment of the

bonds, but questions do arise, and must necessarily be considered, whether and to what extent the Government released to the companies any of the obligations imposed upon them by the act of 1862. The claim of the company is that in several particulars releases and modifications of the obligations imposed by the act of 1862 were made by the act of 1864. Some of the more notable, affecting the bonded debt, will be pointed out.

First. Section 7 repeals the provision in section 17 of the act of 1862, providing for a reservation of a portion of the bonds until the road should be completed.

Second. By section 10 radical and important changes are made. It is as follows:

SEC. 10. *And be it further enacted*, That section five of said act be so modified and amended that the Union Pacific Railroad Company, the Central Pacific Railroad Company, and any other company authorized to participate in the construction of said road, may, on the completion of each section of said road, as provided in this act and the act to which this is an amendment, issue their first mortgage bonds on their respective railroad and telegraph lines to an amount not exceeding the amount of the bonds of the United States, and of even tenor and date, time of maturity, rate and character of interest, with the bonds authorized to be issued to said railroad companies respectively. And the lien of the United States bonds shall be subordinate to that of the bonds of any or either of said companies hereby authorized to be issued on their respective roads, property, and equipments, except as to the provisions of the sixth section of the act to which this act is an amendment, relating to the transmission of dispatches and the transportation of mails, troops, munitions of war, supplies, and public stores for the Government of the United States. And said section is further amended by striking out the word "forty," and inserting in lieu thereof the words "on each and every section of not less than twenty."

This action authorized the companies to issue a first mort-

gage bond to an amount equal to the bonds granted by the United States in aid of the construction of the several roads. The regulation that they should be of even tenor and date and time of maturity, &c., with the bonds of the United States was modified by the act of March 3, 1865, (13 Statutes at Large, 504,) which authorized the companies "to issue their six per centum thirty-years bonds, interest payable in any lawful money of the United States, upon their separate roads." And further, they were authorized to issue such bonds to the extent of one hundred miles in advance of a continuous completed line of construction. The lien of the United States bonds, by section ten aforesaid, was expressly subordinated to the bonds authorized to be issued by either of the companies on their respective roads, &c., "except as to the provisions of the sixth section of the act to which this act is an amendment, relating to the transmission of dispatches and the transportation of mails, troops, munitions of war, supplies, and public stores for the Government of the United States;" and as to the compensation for such services, by section five it was enacted that only one-half thereof should be required to be applied to the payment of said bonds. The object of this legislation and change of the contract is explained in the opinion of this Court, delivered by Mr. Justice Davis, in the Union Pacific case (91 U. S., supra), and the acts were liberally construed—indeed such is the rule in the construction of all statute contracts. The rule which appertains to the construction of contracts and covenants between individuals is applied to statute contracts. The words of the statute subordinating the Government bonds, with the exception stated, are very plain, and cannot be misunderstood. There is not one word about the five per cent. upon net earnings. Clearly the obligation to pay such five per cent. was annulled, and was so understood by all parties for several years afterward; for Congress, on the 25th of June, 1868, before any of the roads were completed, passed an act entitled An act relative to

filing reports of railroad companies (15 Statutes at Large, 79,) in which, by section one, it was provided that the reports required by the twentieth section of the act of 1862 should thereafter be made to the Secretary of the Interior on or before the 1st day of October in each year, and that all the reports heretofore made to the Secretary of the Treasury under said act of July 1, 1862, should be transferred to the Secretary of the Interior, to be filed by him. By the fourth section of the act of June 25th, 1868, it is enacted: "That in addition to the eight subjects referred to in section twenty of the act of July, 1862, to be reported upon, there shall also be furnished annually to the Secretary of the Interior all reports of engineers, superintendents, or other officers who make annual reports to any of said railroad companies." By this it seems quite clear that Congress, at that date, understood that the act of 1864 had repealed or made obselete the obligation to pay the five per cent.; that it was no longer necessary that the reports should be made to the Secretary of the Treasury, whose duty it was, by the act of 1862, to compute and ascertain what the net earnings of the companies were, and that, therefore, all the reports should be made to the Secretary of the Interior, who had, by executive order of President Lincoln, been charged with the duty of superintending the execution of the laws in relation to the Union Pacific Railroad Companies. The claim is that the legislation of Congress from 1864 to 1868, inclusive, shows that by common consent, as well as by express act, the obligation to pay the five per cent of net earnings was annulled.

The question has to be met in the progress of the many controversies already existing or to exist between the Government and these railroad companies, whether the law, of its own force, is sufficiently explicit and of sufficient vitality to execute the contracts with the companies, so far as the same relates to the observance of the conditions imposed upon the companies, for the constructing, operating, and

maintaining the roads, and for the payment of the bonds and interest advanced by the Government in aid of the construction of the roads; whether the companies, for an alleged breach of these obligations, or any of them, have the right to put the Government at defiance, unless by resorting to such remedies as are provided for ordinary suitors in court, it shall be judicially determined that there has been such breach; whether the United States, having, by statute, created a right and provided a remedy, are like other parties, confined to the remedy provided by the statute?

In addition to the authorities already cited, the following affecting individuals and municipalities are referred to:

Roberts *vs.* Landecker, 9 Cal., 262.
Cole *vs.* Muscatine, 14 Iowa, 296.
Hazen *vs.* Essex County, 12 Cush., (Mass.,) 475.
McCormick *vs.* T. H. R. R., 9 Ind., 283.

If we are in error in the claim that the obligation to account for the five per cent., is made obsolete by the act of 1864, then it is necessary to consider—

III.

Of what Earnings and of what Incomes is the Company bound to render the Five per cent.

In express words the Government lien is subordinated to the equivalent of bonds issued by the company. These bonds by the act of 1862 and of March 3, 1865, were to bear six per cent. interest, payable semi-annually, payable thirty years after date. The companies were bound, and it was a condition of the grant, (act of 1862, sec. 6,) 1, to keep said railroad and telegraph line in repair and use; 2, to transmit at all times dispatches over said telegraph line; 3,

to transport mails, troops, and munitions of war, supplies and public stores upon said railroads for the Government whenever required to do so by any Department thereof.

To perform these conditions, to avoid a forfeiture, it is necessary that the companies should hold, control, and manage the road. If it does not pay the interest upon the bonds authorized and issued under the acts aforesaid, a foreclosure must occur, and by that the company will be prevented from performing the conditions of the grant, specified in section 6. Section 10 of the act of 1864 describes the bonds of the company to be issued as first mortgage bonds. Section 1 of the act of 1865, modifying and amending section 10 of the act of 1864, authorizes the companies to issue their bonds to the extent of one hundred miles, &c. The word mortgage is not found in that act: but in construing the words in these acts authorizing the issue of bonds they are undoubtedly to be understood as conferring upon the companies the right to make the usual mortgage, or mortgages, made by railroad companies to secure their bonds, and it would be quite absurd to argue that bonds thus issued and secured upon the road are not to be protected by the companies by the application of the income of the road to keep down the interest, pay the principal, and so prevent a forfeiture. It is plain that that was what was expected and intended by the parties.

Moreover, it is clear that by the provisions of section 10, act of 1864, the statute lien of the United States for the payment of principal and interest of its bonds is subordinated to bonds secured by mortgage to be executed by the company; and conceding, for the sake of the argument, that five per cent. of the net earnings of the road is to be annually paid to the United States upon the debt of the company, such five per cent. is embraced within the statute lien of the United States, and secured by it, and by said section 10 expressly subordinated to the mortgage debt to be created by the company. So that there seems to be no room for argu-

ment that the company has the right, in any aspect of the case, to provide for the payment of the interest upon its preferred debt, and pay the same out of the incomes of the property before any account of net earnings can be taken. Indeed, the right of the company to provide for the payment of principal and interest of all the debts is reserved to it by the eighth clause of section 20, act of 1862, and unquestionably the Secretary of the Treasury would be bound to take such indebtedness into account in making up the statement of net earnings.

Again, to prevent a forfeiture under the conditions of section 6, we are to consider the character of road we are dealing with. By section 4, act of 1862, the road is to be of first class, and as such, by section 6, to be kept in repair and use. To do that, replacements and additions are constantly required, not only of the road-bed and its appurtenances, but also of the rolling stock. With the increase of traffic and the development of the wilderness, additional sidings, stations, and, in fact, all such new and further appliances as are necessary to transact their business, must be provided by the companies to meet the Government and public requirements, and no railroad company has ever yet been able to anticipate and provide for all the requirements of the future. Then, to prevent a forfeiture, taxes are to be provided for and paid.

This company appealed unsuccessfully to this Court, to declare it exempt from State taxation. Certainly the Court will not now declare that it has net earnings while taxes remain unpaid. Insurance has to be effected and paid. If these things are unpaid; if the company has money in its treasury, and its road is out of repair and unfit for use; if that money ought to be immediately applied to the payment of taxes insurance, to the paying for additional rolling stock, and to the putting the road in complete repair as a first-class railroad. No one can justly say that such money is "net earnings" of the company to be fairly applied to the

payment of dividends, or to the United States, upon its bonded debt.

The expenditure of such money in such case is anticipated, and to be applied in discharging the immediate obligations and duties of the companies in the maintenance and successful operation of their roads, and cannot, in any sense, be said to be "net earnings."

If the fact appeared that the company had, out of its earnings, made a stock dividend, though such act of the company might make a *prima facie* case against it that there had been net earnings: yet it would not be conclusive, and would not work an estoppel in favor of the United States.

Considering the character of the contract of the company with the United States, its express obligation to keep the road in repair and use, the declared object of the contract as expressed in the 18th section of the act of 1864, viz: "to promote the public interest and welfare by the construction of said railroad and telegraph line, *and keeping the same in working order*, and to secure to the Government, at all times, (but particularly in time of war,) the use and benefit of the same for postal, military, and other purposes," and that no other fund was provided for these purposes besides the earnings of the road, it must be conceded that the parties contemplated, from the very necessity of the case, that all the earnings of the road were to be held by the company and applied, if necessary, to carrying out and securing such expressed object. It is but common knowledge that large expenditures of money are constantly required to maintain railroad tracks and structures, to provide replacements and additions made necessary by increase of business, also by casualty from storms and natural decay. Considering the stringent obligations upon the companies, common prudence as well as economy demands that they shall, at all times, keep in their treasuries a sufficient sum to provide against loss and delay from injuries to the roads caused by unforeseen and inevitable casualty. And though

there might, at the end of any year, be found a sum of money in the treasuries, yet the companies could not be required, under the act of 1862, to pay five per cent. of such money to the Government, if it was apparent that the entire sum would be directly required to keep the roads in repair and use. It is the right and duty of every railroad company—much more the roads embraced in the Union Pacific Railroad system—to keep a reserved fund on hand to provide against all contingent losses and accidents of every kind and character. The rigorous demand of the contract is that the road shall be kept in repair and use, and the contract at no time allowed the Government to make any demand upon the company which should in any degree prevent it from performing this most essential part of the contract.

This Court, in the case of St. John, 22 Wallace, 136, took a broad and catholic view of the right of the Erie Railroad Company to apply its gross earnings to the payment of the interest and rents, before liability to account for such earnings as "net earnings." It is urged that that decision is conclusive, in favor of the defendant, on this branch of the case.

If, contrary to this agreement, the court shall determine that the obligation to account for five per cent. net earnings has not been made obsolete, a question will arise in this cause as to whether the lien of the United States extends over all the railroad of the Kansas Pacific Company, and that on it net earnings are to be computed over the whole line, or only over a part, and in this connection it will necessarily have to be considered what deductions on account of interest, taxes, repairs, &c., is to be considered in ascertaining such net earnings. But before discussing this branch of the case we proceed to a review of other and subsequent acts of Congress which are supposed to bear upon the subject.

IV.

The second section of the act of March 3, 1873, (17 Stats. at Large, 508,) directs the Secretary of the Treasury "to withhold all payments to any railroad company and its assigns on account of freights or transportation over their respective roads, of any kind, to the amount of payments paid by the United States for interest upon bonds of the United States issued to any such company, and which shall not have been reimbursed, together with the five per cent. of net earnings due and unapplied, as provided by law."

This Court, in the case of the United States *vs.* Union Pacific Railroad Company, 91 U. S., 72, has decided that the withholding by the United States of the money due to that company for transportation was a breach of the charter contracts. With individuals, private parties, the breach by one of them of an executory contract, the refusal by one party to go on and perform upon his part an essential duty, puts an end to the contract. It is an abandonment of the contract without justification, and strictly he can recover nothing on account of the contract, because he does not come into court with clean hands. In the case of McDermott *vs.* Jones, 2 Wallace, 1, this Court, by Justice Swayne, said: "While a special contract remains executory the plaintiff must sue upon it." "When he has been guilty of fraud, or has wilfully abandoned the work, [contract,] leaving it unfinished, he cannot recover in any form of action." So, when Congress passed this act, it was a determination of the Government to abandon and put an end to the contract.

It is true that by section 22 of the act of 1864 it is enacted "that Congress may at any time, alter, amend, or repeal this act;" but what of this? It might be altered or amended with the consent of the Kansas Pacific Company, and as altered or amended would be the contract from the time of such consent. Such alterations and amendments were made

March 3, 1865, May 1, 1866, July 3, 1866, July 26, 1866, and March 3, 1869. Or it might repeal the law: that is, might abandon the contract—refuse to be bound by it. That is a right that every contracting party has: but if they abandon the contract, refuse to abide by it, if such abandonment is fraudulent, oppressive or willful, the party refusing to perform the contract is without remedy. So it was decided in McDermott's case, and the rule of law does not vary when it comes to be applied, whether the party in judgment be sovereign or subject.

It may be that the foregoing principles of law stated in this division of our subject will not be found applicable to the case in hand, inasmuch as there is no specific finding that the Government has not paid for transportation, notwithstanding the act: but it is submitted that the presumption of law is that it did not pay, and that by act of Congress the United States has elected to abandon the contract.

V.

The act of June 22, 1874, 18 U. S. Statutes at Large, 200, remains to be considered. It is as follows:

"AN ACT providing for the collection of moneys due the United States from the Pacific railroad companies.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the Secretary of the Treasury be, and hereby is, directed to require payment of the railroad companies, their successors and assigns, or the successors or assigns of any or either of said companies, all sums of money due or to become due the United States for the five per centum of the net earnings provided for by the act entitled 'An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the Government the use of the same for postal, military, and other purposes,' approved July first, eighteen hundred and sixty-two, or by any other act or acts in relation to the companies therein

named, or any other such company or companies; and in case either of said railroad companies shall neglect or refuse to pay the same within sixty days after demand therefor made upon the treasurer of such railroad company, the Secretary of the Treasury shall certify that fact to the Attorney General, who shall thereupon institute the necessary suits and proceedings to collect and otherwise obtain redress in respect of the same in the proper circuit courts of the United States, and prosecute the same, with all convenient dispatch, to a final determination.

"Approved June 22, 1874."

This act, as well as the act of 1873, refers to a claim of the United States for five per cent. of net earnings. Congress, seeming to be unconscious that such claim had been waived or repealed by sec. 10, act 1864, and that the United States had put an end to the contract by the refusal of the Government to pay the half compensation for transportation, and with the expressed intention of compelling the companies to pay five per centum of their net earnings, notwithstanding that obligation had become obsolete by the act of 1864, directed the Secretary of the Treasury to require payment from the several railroad companies, any or either of them, of all sums of money due or to become due the United States for the five per centum of the net earnings provided for by the act of July 1, 1862, and in case of neglect or refusal to pay within sixty days after demand to certify the fact to the Attorney General, and then, and only then, it became his duty to institute the proper and necessary suits to recover the money demanded.

If the right of the United States to require the payment of the five per cent. was not repealed or waived by the 10th section of the act of 1864, this act of 1874 must be harmonized with existing laws. Since 1817 the law has been that "all claims and demands whatever by the United States or against them, and all accounts whatever in which the United States are concerned, either as debtors or as creditors, shall be settled and adjusted in the Department of the Treasury."

R. S. U. S., section 236, p. 39.

As before urged, the purpose of section 20, act of 1862, was to provide the material for settlement—to present and submit to the Secretary of the Treasury the verified facts upon which he could proceed to settle and adjust the accounts. This act of 1874 directs the Secretary of the Treasury to require payment, but payment of what? Unquestionably such sums as he shall find upon settlement and adjustment to be due. First there must be an adjustment and settlement, and then a demand, and until that is done and a refusal of payment for sixty days after the demand, he has no authority to report anything concerning it to the Attorney General. The matter that he shall report is that he demanded a sum certain, not that he demanded a settlement or demanded payment generally of an unadjusted account, for if the Attorney General could proceed upon that it would be contrary to the law as well as to the theory and practice of the Government in the settlement and adjustment of its accounts. Until a demand of the Government is settled and adjusted in the Treasury Department, whether correctly or erroneously, no action can be maintained upon such account, nor is it a subject of set-off. In many cases an account adjusted in the Treasury Department is conclusive against the party against whom it is adjusted.

Murray's case, 18 How., 272.

But it seems that this is not the case if the amount due is not certainly known to the Department; and that in almost all instances the law has provided some mode by which the party charged can demand the judgment of a court. This particular subject need not be further pursued, for it will not be claimed that the Attorney General was authorized to direct the prosecution of the suit against the Kansas Pacific Company by reason of the statute of 1874, unless the Secretary of the Treasury had made the report to him required by that act.

Should it be claimed that an erroneous construction has

been placed upon this act, and that the Secretary of the Treasury was directed to make a demand for payment, but of no particular sum, that the law requiring all accounts to be settled and adjusted by the Treasury Department is aside in this case, yet he must make a report that the company would not pay anything, or, if it did, that it had not paid as much as the Secretary supposed it ought to have paid; that the account had not been adjusted: then, in such case, the necessary suit, which the Attorney General would have to bring, would be in equity, for an accounting, and not at law.

Upon the assumption that the foregoing contains the proper exposition of the statutes bearing upon the question at issue, we now proceed to examine—

VI.

The Question of the Liabilty of the Pacific Railroad Company under the Pleadings and Findings of the Court.

The record discloses two petitions, the first commencing on page 1, ending on page 3. The second, an amended petition, on pages 6–9. The latter is in lieu of the former, and wholly supersedes it. The former cannot be referred to for any purpose. There was an answer to the amended petition on pages 9–11, but the 3d and 4th, and 5th paragraphs of the answer were demurred to. (pages 11 and 12.) The answer was afterwards withdrawn, and a general denial was filed, (pages 12 and 13.) The cause was referred, but it does not appear that the referee ever made any report. A jury was waived, (page 12,) and on the 15th of June, 1877, upon special findings by the Court of the fact in the case, (pages 14–17.) judgment was entered for the defendant.

Referring to the special findings of fact by the Court, it is important to consider what the Court did not find, as well as what it did. First, the Court did not find that there had

ever been any account stated of the supposed net earnings, either by the parties or by the Secretary, and manifestly no such finding ought to have been made, because there is no averment in the petition that any accounting had been had—any demand for an account or demand for the payment of any money. There is no averment in this pleading or finding upon any of these matters.

By the 5th finding, the railroad of the defendant was completed on the 19th of October, 1872, and that in connection with the 3d and 4th findings is to be taken to be a completion of the road from the Mission river to Denver. By the 1st finding, it is established that the Government issued bonds to the defendant in aid of the construction of its railroad from the State line of Missouri, $393\frac{5}{16}$ miles, westward; and that from thence to Denver, 245 miles, and for the Leavenworth branch, 34 miles, no bonds were issued.

Upon this state of the case a question is made whether, if the company shall be adjudged to account for five per cent. net earnings, such account shall be upon the whole of its road, 673 miles, or only upon $393\frac{5}{16}$ miles. On the part of the defendant it is seriously urged that the lien of the United States on account of the bonds issued to the company is confined to that part of the road to aid in the construction of which the bonds were issued. Section 5 of the act of 1862 declares that the issue and delivery of such bonds to the company shall, *ipso facto*, constitute a first mortgage on the whole line of the railroad and telegraph, rolling stock, &c., *and in consideration of which said bonds may be issued*. The finding shows that the bonds in this case were issued in consideration—in aid of the construction of the road from the State line to the $393\frac{5}{16}$ mile-post. The proviso to the section declares that it "shall not apply to that part of any road now constructed," plainly showing that if this or any of the companies aided by the act had already constructed any portion of their railroad the statute mortgage of the

United States should not extend to the part constructed, and therefore such part of the road is not bound to contribute to the payment of the bonds. The 11th section of the amended act, July 2, 1864, is very explicit in protecting the United States in the issue of its bonds, and the last proviso to that section was intended to exclude, and does exclude from the operation of the act, any part of the road not constructed under the act of 1862 or 1864. The proviso is as follows:

"*Provided, also,* That no land granted by this act shall be conveyed to any party or parties, and no bonds shall be issued to any company or companies, party or parties, on account of any road or part thereof made prior to the passage of the act to which this act is an amendment, or made subsequent thereto, under the provisions of any act or acts other than this act and the act amended by this act."

This section does not conflict with section 5 of the act of 1862, and plainly limits the lien of the United States to the portion of the road in consideration of which it should issue its bonds. By the 12th section of the act of 1864, the company was required to "*build a railroad* from the city of Leavenworth, to unite with the main stem at or near the city of Lawrence; but to aid in the construction of said branch the said company shall not be entitled to any bonds." Now, this Leavenworth branch is no part of the main line authorized and required to be constructed by the act of 1862. It is an independent line of road, and though that act provides that it should be built within two years, yet there was no forfeiture imposed, either of bonds or lands, if the company should fail to build it. The bonds were to be issued and the lands patented, if the conditions were kept in respect to them, the same as though the road from Leavenworth had never been mentioned. The law imposes no conditions upon the company to submit the Leavenworth branch to the inspection of the commissioners. It is not required to be a first-class railroad, but simply *a railroad*.

It is not the railroad that the company is required to keep in repair and use and in working order. It is not required to be operated in connection with the main line or as a part thereof. True, it intersects the main line forty miles west of the State line, and it is reasonable to suppose that Congress expected that it would be operated so as to accommodate the public in connection with such main line, but that is all. It did not provide that the branch, or its rolling stock, should be subject to the lien of the United States. The company had the right to mortgage, and has mortgaged, the branch as an independent property. The Government has no lien upon it, and is not entitled to farm out of it five per cent. of its net earnings, to discharge a lien upon other portions of the road of the company, upon which the United States, if the contract is in force, has confessedly a lien.

We have now to consider the act of March 3, 1869, the title of which, and the first and third sections, are as follows:

ACT MARCH 3, 1869.

AN ACT to authorize the transfer of lands granted to the Union Pacific Railroad Company, Eastern Division, between Denver and the point of its junction with the Union Pacific Railroad, to the Denver Pacific Railway and Telegraph Company, and to expedite the completion of railroads to Denver, in the Territory of Colorado.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Union Pacific Railway Company, Eastern Division, be, and it hereby is, authorized to contract with the Denver Pacific Railway and Telegraph Company, a corporation existing under the laws of the Territory of Colorado, for the construction, operation, and maintenance of that part of its line of railroad and telegraph between Denver City and its point of connection with the Union Pacific Railroad, which point shall be at Cheyenne, and to adopt the road-bed already graded by the said Denver Pacific Railway and Telegraph Company as said line, and to grant to said

Denver Pacific Railway and Telegraph Company the perpetual use of its right-of-way and depot grounds, and to transfer to it all the rights and privileges, subject to all the obligations pertaining to said part of its line.

SEC. 3. *And be it further enacted*, That said companies are hereby authorized to mortgage their respective portions of said road, as herein defined, for an amount not exceeding thirty-two thousand dollars per mile, to enable them, respectively, to borrow money to construct the same; and that each of said companies shall receive patents to the alternate sections of land along their respective lines of road, as herein defined, in like manner and within the same limits as is provided by law in the case of lands granted to the Union Pacific Railway Company, Eastern Division: *Provided*, That neither of the companies hereinbefore mentioned shall be entitled to subsidy in United States bonds, under the provisions of this act.

Approved March 3, 1869.

From this act, in connection with the first, second, and third findings, it quite well appears that the company had not the means to prosecute the construction of its road beyond Sheridan, 405 miles west of the State line, and that the United States, to relieve the company of its embarrassment, and to expedite the completion of the railroads to Denver, provided for bringing into the system the Denver Pacific Railway and Telegraph Company, which should build and operate the railroad from Denver to Cheyenne on the Union Pacific, succeed to the rights of the Kansas Pacific Company to the grant of lands between those points, and authorized it and the Kansas Pacific Company to mortgage their respective portions of railroad, for an amount not exceeding $32,000 per mile, to enable them respectively to borrow money to construct the same. Here, then, the entire face of the case is changed.

By the proviso of the act it is declared that no aid other than the land grant should be given to the companies, but authority was given them to mortgage their road for $32,000 per mile, precisely the amount resting upon the main line

of the road east of the 394th mile-post, sixteen thousand per mile first mortgage bonds of the company, and sixteen thousand per mile statute mortgage—thirty-two thousand in all.

With this state of facts before us, it is absurd in the last degree for the Government to set up a claim that it has any lien upon the road west of the 394th mile-post. Having authorized the mortgage of $32,000 per mile, the United States impliedly agreed that the beneficiaries under that mortgage should have the benefit of the property—should have the benefit of all the incomes and earnings of that part of the road to keep and pay down the interest upon the debt secured by the mortgage. The authority to make a mortgage, general as this was, authorized the company to insert in it all the covenants known to conveyancers, to empower the mortgagee to possess himself of the property on default of payment of interest, to take such action from time to time as might be necessary to divert all the incomes, issues, and tolls of the property to the payment of the mortgage debt and interest. These powers and rights are quite inconsistent with the claim that the Government may interfere and require that five per cent., or any other per cent., of the earnings and incomes of that part of the road shall be applied to the payment of its bonds; and more than this, by the authority conferred by this act of March 3, 1869, authorizing the mortgage to be made, the United States agreed not only to forego any account respecting the five per cent., but also to forego all claim to retain half the compensation to be paid to the company for service on that part of its line. This act so changed and modified the contract that the obligations resting upon the company in respect to the application of compensation for services, and in respect to the five per cent., if that claim was not already waived, that the lien of the United States on account of its bonds issued to the company was absolutely limited to that part of the road to aid in the construction of which the bonds were

issued, namely: from the State line to the 393 15/16 mile-post.

Upon this subject much more may be said, and probably will be, upon another occasion. For the present occasion, suffice it to say that the company lays great stress upon this part of its case, for if its claim is rightful and proper it will result greatly to the advantage of the company, because it will get full compensation for transportation on all parts of its road other than from the State line to the 394th mile post, and if compelled to account for net earnings, the account would be taken of only that part of the line.

It will be found, upon an inspection of the facts that the cause was tried upon a supposed state of case altogether different from the above contention of the company. It was assumed that the alleged lien of the United States was upon the Leavenworth road and the road west of the 394th mile post, called the Denver extension, and it was of the earnings and expenses of all these roads that the accounts were stated, as shown in the tables annexed to the findings. What part of the expenses were incurred in respect of the roads not subject to the Government lien is not stated, nor is there any statement which will enable this Court to make any determination in respect to such expenses, but even, as to that, if the company is bound to submit to any statement of an account, which is denied, the judgment cannot be disturbed. It is entitled to have brought into such account the expenses specified in exhibit C. (See 17th finding.) Referring to that account, the first item, as it is called, objected to, is depreciation account, specified in exhibit D. The 10th finding of the Court is of this particular item. In the former part of this argument we have endeavored to maintain that the incomes of the company could not lawfully be devoted to the payment of dividends or be regarded as net earnings so long as they were required to be expended in operating or maintaining the road as a first-class road; and if, at any time, there was a reasonable necessity for the expenditure of money to place and keep

the road in first-class condition, suitable to the current public wants and need, it mattered not that the company might have money in its treasury derived from the earnings of the road, it could not be denominated net earnings while there was an immediate pressing necessity for its expenditure upon the road. This account was made for the purpose of showing that, although the money had never been expended, yet such expenditure was absolutely required, as the Court has found (finding 11,) and that before the company could be required to pay anything to the Government, the burden rested upon the Government to show that the company was in actual receipt of money not necessary or proper to be expended in maintaining the road in first-class condition and working order; and as to that, the Court has found that near $2,000,000 were required to be expended to place the road in the condition required by the contract.

The next item objected to is the charge for moneys actually laid out in improvements, additions to tracks, construction of side tracks, switches, bridges, &c. The objection to this account is evidently more technical than real, because it is called construction account. The detailed explanation of this account is found in the 13th finding. Possibly the comparatively nominal sums paid for right of way, amounting to about $13,000, ought not to have been included in the account, for it may be said that that was an expense that ought to have been provided for before the road was offered to the President for acceptance. Still it does not follow that the account is improper, because it may have been incurred in the purchase of additional right of way, made necessary by increasing business; and this is to be inferred from the 13th finding, which must be presumed to have been found upon evidence showing the expenditure and charge proper: "These expenses were reasonably necessary for the operation and maintenance of the road." It is not believed that it will be seriously contended that the title or designation of the account by the company in its

books will in any way derogate from the propriety of the charge. It is to be taken as a fact not to be challenged or controverted, that the road was duly inspected by commissioners appointed by the President, found, and reported to him, to be in all respects in accordance with the requirements of the contract: and that these expenses were incurred after the President had accepted the road as complete, and that they were necessary and proper the court has found.

What has just been said in respect to the construction account applies with greater force to the equipment account objected to.

The next item of account objected to is real estate. The 15th special finding is of that item. The finding speaks for itself. There is no pretense that the expenditure was not necessary and in all respects proper. All railroad companies, with the increase of business, find it necessary to incur such expenses, and as their only resource for money is in the earnings and income of the road, they are necessarily devoted to discharging such expenses. The money paid in discharge of such expenses, instead of being made applicable to charges for net earnings or dividends, is added to the capital, and being so done in this case, has to that extent increased the security of the United States.

The money paid for interest upon the mortgages is objected to, but that objection has already been fully discussed.

The account was made up in such way as to show all the earnings of the road, whether collected or not: and inasmuch as, by the contract, the United States was to pay half the charges for its transportation, in the account it was assumed that such half had been paid; and as to the other half, retained in the Treasury of the United States, the claim of the company was that the Government was not entitled to collect from it five per cent on that money. The demand of the Government was that it not only had the right to re-

tain half the compensation for transportation, but to collect five per cent. upon the money kept in its treasury. It is submitted to the court whether such a construction of the contract is either fair or legal.

Finally, upon the whole case the contention of defendant is—

First. That the United States has by various amendments to the act of July 1, 1862, waived its claim to demand of the defendant an account of its net earnings.

Second. That if it shall be held that such right of claim has not been waived: before any action at law can be brought for it the same must have been settled and adjusted in the Treasury Department.

Third. If not so adjusted and settled, by reason of any willful fault or omission of the defendant, the action for its recovery must be brought upon the equity side of the court for an account and payment.

Fourth. That it does not appear by the pleadings or findings in the case that the company has been guilty of any default whatever in respect to this five per cent. claim.

Fifth. That neither by the act of July 1, 1862, or by any other act, is the defendant liable to suit until the account is settled and adjusted and a demand made.

Sixth. That only part of the railroad of the defendant between Missouri and Denver, east of the 394th mile-post, is subject to the lien of the United States for its bonds issued, and that to that part of the road the United States is limited in enforcing the right for the payment of its bonds, principal and interest.

Seventh. That the Government has no right to require

the company to transmit its dispatches, or to transport its mails, troops, and property upon the other portion of its road, or upon the Leavenworth branch, upon the terms of receiving half compensation therefor, to be paid to the company, and the other half to be paid to the bonded account: that the suit for the supposed five per cent. net earnings upon the whole line of the road and the Leavenworth branch cannot be maintained; and, if any suit could be maintained, the same must be in equity for an account of the earnings on the 394 miles to aid in the construction of which the bonds were issued. But, if we are in error in all these respects, the findings of the court are of such form and character as to preclude any recovery by the plaintiff.

Before concluding some general remarks respecting this statute contract may be indulged. What were the facts? The United States desired the construction of the railroads mentioned in the act of 1862. By that act it proffered to various companies contracts for constructing the desired roads. With the exceptions of the lines that were to be located in Kansas and California all were within the Territories of the United States, and within their exclusive jurisdiction. Kansas and California petitioned Congress to provide for the construction of the roads, and estopped themselves from objecting to the exercise of the power. The companies on account of the war being unable to proceed with the construction as rapidly as desired, Congress passed the amendatory act of July 2, 1864, to accomplish its objects, but declared that it would alter, amend, or repeal that act at pleasure. Under that provision Congress has assumed from time to time to assert and declare, by laws of its own enacting, the construction and meaning of the statute contract for the construction of these roads. See how unfair and unequal this is. If the companies were to resolve and declare the meaning of the contract, and insist that such resolution had the force of law, it would be only the equivalent of what Congress has done; and how wide apart would the

parties be if the companies could be justified in acting that way? It does appear that the only just rule to be observed in the judicial determination of the rights of the parties under these statute contracts is to declare that any alteration or amendment of the contract not accepted by the companies is to be disregarded, and that a repeal of the act or a refusal on the part of the United States to perform its terms puts an end to the contract, remitting the Government, as any other party violating its contract, to recover, if the law will permit it, the money or the value of the bonds it has advanced in aid of the roads.

In the tax case of Thomson, 9 Wall., 579, this Court was strenuously urged to declare that the railroad was a military, postal, and commercial road, devised and existing under the laws of the United States as a means employed by Congress to carry into execution the powers conferred on that body: that it was a Government road, and therefore exempt from taxation by the States and Territories. The Court did not take that view of the case, and the matter being again brought before the Court in Peninton's case, 18 Wall, 5, the former decision was affirmed. The effect of these decisions was and is that the United States is but a creditor of the several corporations, they being debtors. It follows that the United States being but a creditor, they are remitted to the laws of the land for the enforcement of the contract with the companies and the collection of the debt, if by contract they may.

If the view asserted by the plaintiff in the tax cases had been maintained, the United States could unquestionably have enforced their rights by their own laws, made or to be made: but the contrary having been ruled, the serious question is likely to arise whether the United States have any other rights or remedy than the contract gives them, to be enforced in Kansas in accordance with Kansas laws, its mortgage, whatever it may be, to be subjected to the ordeal of Kansas law: and to the same law must be referred

the construction of the contract between this company and the United States. The obligation of parties to conform to local laws, and the disposition of property under them, has been lately considered and decided in this Court in *Brine's case*, 96 U. S., 627. Without the consent of this company it cannot be changed by act of Congress at all. It is time that these matters were looked into with some care, that it may be known whether this statute contract is a shifting and flexible one, to be changed from year to year, without the consent of the companies, as the caprice of Congress may incline it to do. In these remarks the distinction between laws which of themselves make contracts and those which provide for the government and operation of the road, such as police regulations, &c., has not been overlooked.

The claim is that Congress cannot add burdens or liabilities upon the companies, not specified in the contracts, nor can it by law absolve itself from the performance of its contract, as it has repeatedly attempted to do.

J. P. USHER,
For K. P. Company.

In the Supreme Court of the United States.

OCTOBER TERM, 1878.

No. 418.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,

vs.

THE KANSAS PACIFIC RAILWAY COMPANY,
DEFENDANT IN ERROR.

BRIEF OF S. W. SANDERSON FOR DEFENDANT IN ERROR

Judd & Detweiler, Printers.

Supreme Court of the United States.

OCTOBER TERM, 1878.

No. 418.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,

vs.

THE KANSAS PACIFIC RAILWAY COMPANY, DEFENDANT IN ERROR.

BRIEF OF S. W. SANDERSON FOR DEFENDANT IN ERROR.

It is not my intention to discuss all the questions presented by the record, some of which are merely technical, and others, though not technical, are peculiar to this case. I shall confine my remarks to such questions as are common to all the roads which were constructed under the Pacific Railroad acts of Congress of July 1, 1862, and July 2, 1864. Nor shall I discuss the question as to when the Kansas Pacific Road was completed: whether it was completed on the 2d of November, 1869, as alleged in the petition, or on the 19th of October, 1872, when it was finally accepted by the President. Substantially the same question arises in the Central Pacific case, and what I have to say, in relation to it, will be said in that case. My remarks will be confined to two principal questions:

First. Is the five per cent. claim of the United States confined to the net earnings of roads, the construction of which was aided by the United States, by issuing and delivering the subsidy bonds provided for in the 5th section of the act of Congress of July 1, 1862: or does it extend to and include the net earnings of all other roads which may belong to any of these companies, but for the construction of which no subsidy bonds were issued? And—

Second. What are net earnings, within the meaning of the act of Congress of July 1, 1862: or, in other words, what deductions are to be made from the gross earnings before the five per cent. claimed by the United States is to be computed: and especially, is the interest on the first mortgage bonds of these companies, issued under the provisions of the 10th section of the act of July 2, 1864, to be deducted from the gross earnings before the five per cent. in question is computed?

These questions will be discussed in their order:

I.

The five per centum, in question, is to be computed upon the net earnings of roads in aid of which the subsidy bonds were issued—net earnings of all roads which were not so aided, although belonging to the same company, being excluded from the computation.

The provisions of the contract between the United States and the Pacific Railroad Companies, in view of which this question is to be determined, are parts of sections five and six of the act of 1862, and part of section eleven of the act of 1864. They severally read, as follows:

"SEC. 5. * * * the issue of said bonds and delivery to

the company shall, *ipso facto*, constitute a first mortgage on the *whole* line of the railroad and telegraph, together with the rolling stock, fixtures and property of every kind and description, *and in consideration of which said bonds may be issued:* * * * *Provided*, this section shall not apply to that part of any road now completed."

"SEC 6. * * * the grants aforesaid are made upon condition that said company shall pay said bonds at maturity, and shall keep *said* railroad and telegraph line in repair and use, and shall at all times transmit despatches over *said* telegraph line, and transport mails, troops, and munitions of war, supplies and public stores upon *said* railroad for the Government, whenever required to do so by any department thereof, and that the Government shall at all times have the preference in the use of the *same* for all the purposes aforesaid; * * * and after *said* road is completed, until said bonds and interest are paid, at least five per centum of the net earnings of *said* road shall also be annually applied to the payment thereof."

"SEC. 11. * * * *Provided, also*, That no land granted by this act shall be conveyed to any party or parties, and no bonds shall be issued to any company or companies, party or parties, on account of any road or part thereof, made *prior* to the passage of the act to which this act is an amendment, or made *subsequent* thereto, *under the provisions of any act or acts other than this act and the act amended by this act.*"

In view of the foregoing terms of the contract, it is surprising that the United States should assert the claim in question. Yet this claim has not only been made in this case, but it has been also made in relation to the Central Pacific Company. In this case the United States claims five per cent. of the net earnings of 279 miles of road to which no subsidy bonds were issued. In relation to the Central Pacific Company, Congress has recently, by what is known as the "Thurman Act," asserted a right to a share of the net earnings of several roads, none of which were constructed under said acts of Congress of 1862 and 1864, and some of which were not built under any law of

Congress, but were built under the laws of California, and by companies which never received any aid from the United States, of any kind—lands or bonds. The road from San Francisco to Niles Station, a distance of 32 miles, was not built by any company named in any acts of Congress, but was built by a company organized wholly under the laws of California, without any aid from the United States. The same is true of the San Joaquin branch, from Lathrop to Goshen, a distance of 145 miles. The Oregon branch was built under an act of Congress of July 25, 1866, which is an act "*other than*" the Pacific Railroad acts of 1862 and 1864, and although a grant of lands was made to aid its construction, no subsidy bonds were issued for that purpose. The length of this branch is 150 miles. These roads were all brought into the Central Pacific system, by consolidation under State laws, and are now severally operated by the Central Pacific Railroad Company. They make in all 327 miles of road which received no subsidy bonds, yet, because they chance to have come under the control of the Central Pacific Railroad Company, Congress now claims, under the provisions of the "Thurman Act," 25 per cent. of their net earnings; not only that, but Congress further claims the same rights, as to Government transportation over these non-aided roads, which it has, as to transportation, over the aided roads which belong to the company. I have referred to these facts because they furnish, if possible, a more perfect illustration of the groundless nature of this claim of the United States than the facts of the case at bar.

What then is the proper construction of the foregoing provisions of the act? Upon what road is "the issue and delivery" of the bonds, *ipso facto*, to constitute a first mortgage? What road is the company to keep in repair and use? Over what road is the company at all times to transport mails, &c., for the Government? Over what road is the Government to always have preference in respect to

transportation? The answer to these questions will show what road is intended in the clause in relation to five per cent. of net earnings, for all through sections five and six the same road is referred to as appears from the use of the word "*said*." The only road previously described in the act, is the one which the Union Pacific Company is authorized to build, which is described in the first section of the act, and extends from a certain point in Nebraska to the western boundary of Nevada. So it is clear, that as to the Union Pacific Company, the road intended in the five per cent. clause is the road which that company was authorized to construct and operate by the terms of that act, "and in consideration of which the subsidy bonds were issued." This is true of every other company named in the act. The road it was authorized by that act to construct and operate, "and in consideration of which the subsidy bonds were issued," is the road which it has undertaken to keep in repair and use, &c., and it is of the earnings of that road, and that road only, that it has undertaken to pay the United States five per cent.

The intention of Congress was to secure a lien upon the identical road which the subsidy bonds aided in building. This is conclusively shown by the fact that they were to be issued and delivered *pari passu* with the construction of the road, and were to constitute a first mortgage on the whole line of the road, *in consideration of which* they were so issued and delivered; that is to say, for the *construction* of which they were so issued and delivered. The mortgage was to cover whatever road the bonds helped to build. It was not intended to cover any other road. And whatever road the mortgage covered was to contribute five per cent. of its net earnings, annually, to the payment of the loan secured by the mortgage. The language of the five per cent. clause is "at least five per cent. of the net earnings of *said road*," &c., not five per cent. of the net earnings of any other road, or of the company, but of the road provided for in *that act*.

None of the provisions of this act or contract were intended to apply to any roads other than those therein provided for. Congress proposed to aid in the construction of certain roads; on those roads it proposed to take a mortgage to secure the payment of moneys contributed towards the cost of their construction; over those roads it proposed to secure certain advantages in the matter of transportation; to those roads it did not propose to pay any money for transportation, but to apply all moneys which they might earn in that way to the payment of the subsidy bonds; and, in addition, and for the same purpose, it further intended to exact five per cent. of their net earnings. With other roads, constructed under other acts, Congress did not, by the provisions of this act, propose in any manner to interfere. Nor did Congress intend to fasten a lien upon any road or part of road to which no subsidy bonds were issued, notwithstanding it might be constructed under the provisions of this contract. This is the only sensible interpretation of which the language of the contract is susceptible.

The foregoing sections apply to every company named in the contract, and when they are read with reference to any particular company, the road intended is the road which that company is authorized to construct, and in aid of which subsidy bonds were issued to it. When they are read with reference to the Kansas Pacific Company, they refer to the road which that company is authorized to construct, and in aid of which subsidy bonds were issued, to wit: From the mouth of the Kansas river to the eastern terminus of the Union Pacific, and not to the Leavenworth branch or the Denver extension, "in consideration of which no bonds were issued." When they are read with reference to the Central Pacific, the words "said road" refer to the road which that company was authorized to build by the terms of that act, and "in consideration of which subsidy bonds were issued," to wit: the road from the Pacific Ocean to the western terminus of the Union Pacific, and

not to other roads belonging to the Central Pacific Company, which were neither constructed under the act of July 1, 1862, nor aided by the issue of subsidy bonds.

II.

As to what constitute "net earnings" within the meaning of the five per cent. clause of the act of 1862.

In discussing this point I exclude from consideration the question whether the interest on the mortgage bonds of these companies is, or is not to be deducted from the gross earnings before the five per cent. in question is to be computed; reserving that question for separate consideration, because it rests, in part, upon grounds which do not exist in relation to other deductions claimed by these companies.

The words "net earnings" are used only twice in this act—first in the five per cent. clause of the sixth section, which has been already quoted, and again in the first part of the eighteenth section, which reads as follows:

"SEC. 18. *And be it further enacted*, That whenever it appears that the net earnings of the entire road and telegraph, including the amount allowed for services rendered for the United States, after *deducting all expenditures*—including repairs and the furnishing, running and managing of said road—shall exceed ten per centum upon its cost (exclusive of the five per centum to be paid to the United States) Congress may reduce the rates of fare thereon, if unreasonable in amount, and may fix and establish the same by law." * *

No definition of these words is anywhere given in the act, except in the foregoing quotation from the 18th section. There is, however, another portion of the act which gives strength and point to the definition found in the 18th section. The portion referred to is found in the 20th section, which provides what reports these companies shall be required to make to the Secretary of the Treasury. These reports, among other things, are required to set forth:

"*Fifth.* The amount received from passengers on the road.
"*Sixth.* The amount received for freight thereon.
"*Seventh.* A statement of the expense of said road and its fixtures.
"*Eighth.* A statement of the *indebtedness* of said company, setting forth the *various kinds* thereof." * * *

The purpose for which these facts are required is obvious. It is to enable the Secretary of the Treasury to compute the amount of the five per cent. of net earnings, and to enable Congress to determine when the contingency provided for in the 18th section exists.

The question in hand is to be determined by the aid of these scanty materials and the lexicons.

Not only in construing these provisions of the contract, but in construing every other provision, the great purpose and object which the United States had in view in making this contract must be kept constantly in mind. Every provision of the contract must be read with direct reference to the purpose and object which the contract was intended to secure. The purpose and object of the contract is a limitation upon, or an enlargement of, the meaning of every clause of the contract, according to the exigencies of the case. What, then, was the purpose and object of the United States in making this contract? It was not to secure the fruits of a successful speculation. It was to furnish and secure to the Government the *perpetual use* of a great post and military road which its necessities imperatively demanded. It was to obtain for the people of the country, and to secure to their use forever, a great commercial highway which their social and pecuniary interests imperatively demanded. The undertaking was of gigantic proportions, and of doubtful accomplishment. In comparison, Cheops sank to the level of an ant-hill. In its presence private capital stood appalled. Only the vast resources of a nation were adequate to the enterprise. Under these conditions Congress wisely determined to lend all the aid that might be necessary to

insure success. It would have made its bonds a gift instead of a loan had it been necessary, well knowing that the bread thus cast upon the waters would be returned fourfold in the lessening of future expenditures, in the development of vast regions of unoccupied territory, in the increased wealth and commercial prosperity of the country, and, most important of all, in securing forever the integrity of the Union of States. And it is believed that, notwithstanding the unreasoning hostility which has recently sprung up in certain quarters against these companies, should the question be submitted to-day to the American people—which they would prefer to lose, the money which they have loaned to these companies or the roads which these companies have built—from all sections of the Union would come up the unanimous response, "We can do without the money, but we cannot do without the roads."

By this contract Congress not only intended to secure the construction of these roads, but to insure their being kept in repair and use *for all time*, that they might be always in a condition to respond promptly to all the requirements of the United States, and particularly in time of war, for by the sixth section of the contract these companies are required to keep their roads and telegraph lines in repair and use, and at all times transmit dispatches over their telgraph lines, and transport mails, troops, munitions of war, supplies, and public stores over their roads whenever required by any department thereof.

Such being the purpose and object of this contract, it is not to be so construed as to defeat, or tend to defeat them. These companies must have the means to maintain their roads in repair and use. They must have, without let or hindrance, all of the earnings of their roads which are, or may be, required to enable them to perform their promise. They must retain control of their roads, and to that end they must be allowed the use of the earnings so far as may be necessary to defray their expenses, pay their debts, and

discharge their liabilities of every kind and description, before any part of them can be turned over to the United States. So long as the earnings are required to keep the roads in repair and use, to defray operating expenses, to settle losses and damages, to make replacements and provide additional accommodations required by increase of business, to pay debts legitimately incurred during the year, and to meet all other legitimate outlays, disbursements, and expenditures, none of them can be applied to the payment of the subsidy bonds without putting in jeopardy the very objects and purposes of the contract—a result which Congress never intended. This brings us to the conclusion that the five per cent. in question is confined to that portion of the earnings of these roads which, at the end of the year, under a fair, legitimate, and honest administration of the business and affairs of these companies, may be found in their treasuries, and which it is proper to divide among their stockholders as dividends. By this five per cent. clause Congress intended to secure a share of *that fund*, and allow the remainder to be divided among the stockholders; and this, I respectfully submit, is the only fair and reasonable construction of the contract.

In construing statutes or contracts it will not do to adhere too strictly to lexical definitions, for the meaning of words is frequently influenced by the company in which they are found. Especially must their ~~logical~~ lexical meaning yield to the obvious spirit of the statute or contract as a whole. In saying this, I do not desire to be understood as admitting that the lexical meaning of these words differs from that which is assigned to them: on the contrary, I think it is the same. According to Webster the lexical definition of "net" is, "clear of all charges and deductions." According to Worcester it is "that which remains after the deduction of all charges or outlay as net profit," and such is the meaning which I have accorded to the word.

It has been said, on the part of the United States, that

this construction abolishes all distinction between "net earnings" and "net profits," assuming that these two expressions have different meanings. I deny that there is any difference in their meaning. They are both employed to represent the surplus on hand at the end of the year. Which form of expression ought to be used in a given case depends upon the *source* from which the surplus in question has been obtained. If the surplus in question be the product of traffic, trade, or commerce, it is called "net profits;" but if it be the product of labor, manual or mental, or of services rendered for hire or compensation, it is called "net earnings." Such is the only difference between the use of these two expressions. The difference is not one of sense or meaning, but of circumstance, of application only.

All deductions which a trading company would make in ascertaining its "net profits," a railroad company, which is a common carrier for hire, may make in ascertaining its "net earnings," and the practice of the former illustrates what the latter may do.

The words "net earnings" have seldom come before the courts. I have found but two cases of which they were a part, and both sustain the position assumed in this brief.

Brigham *vs.* Dana (29 Vt., 1) was an action upon the following contract:

"I, Stillman E. Dana, of the town of Warren, Vt., agree that for the sum of two hundred and fifty dollars, to be paid to my full satisfaction by G. N. Brigham, on or before the 25th day of the present month, to go in the ship Argonaut to California for the purpose of gold digging; and what I *earn*, for the term of two years or more, provided it is thought best by the parties to tarry longer, shall be equally divided between myself, or heirs, and G. N. Brigham, or heirs. The sum of two hundred and fifty dollars is to carry me to and from San Francisco to the place of destination. I agree further to have, in case of my decease, the amount taken out of any moneys or interest left by me, sufficient to pay the outfit; and the

remainder, if any, is to be divided equally between my heirs and the said G. N. Brigham or his heirs. Also, if I am unsuccessful, and bring back only money enough to pay my outfit it shall be so appropriated, and enough shall fall in the division to pay my outfit, at least, if accumulated, to the aforesaid G. N. Brigham or his heirs, to be duly delivered to order."

Although this contract did not contain the word "net," yet the court read the contract as if it did, and held that all the expenses incurred by Dana during the two years, including the expenses of an illness which he suffered after his return home, but which was contracted on the Isthmus, must be deducted from his earnings before they were divided between him and Brigham.

The other case is St. John *vs.* the New York and Erie Railroad Company, (22 Wall., 136.) That was a case substantially as follows: The New York and Erie Railroad Company had issued a series of bonds, secured by mortgage on its road, amounting in the aggregate to some twenty millions of dollars. They had also leased other roads, some of which had proved unprofitable, and the result was that, in course of time, the company became bankrupt, and the bondholders commenced a suit to foreclose. While the suit was pending the bondholders and stockholders came together, and made an agreement to the effect that the suit should proceed to final judgment; that the road should be sold and bought in by certain parties, as trustees for the bondholders and stockholders; that a new corporation should then be formed, to which the trustees should convey the road; that the bondholders should surrender their bonds, and take in lieu thereof "preferred stock," and the stockholders should receive, in lieu of the old stock, "common stock." This agreement was carried out. The difference between these two kinds of stock was this: The holders of the preferred stock were to receive seven per cent. on their stock of the net earnings as dividends, and the re-

mainder, if any, was to be disbursed as dividends to the holders of the common stock. The new company, in addition to the roads which the old company had leased and which the new company had continued to operate, leased other roads, some of which proved profitable and some unprofitable. The new company found it necessary to issue bonds, and they did so to the amount of five millions of dollars, bearing interest, For several years the income of the road was sufficient to pay the rent upon the new leases, the interest upon the new bonds, and also seven per cent. dividends to the preferred stockholders. In course of time, however, the earnings of the road failed to pay the rents on the new leases and the interest on the new bonds, and, consequently, there were no net earnings out of which the preferred stockholders could obtain their seven per cent dividends. St. John sued, claiming that in ascertaining the net earnings the rents on the new leases and the interest on the new bonds ought not to be deducted. This court, however, held that they must be deducted from the gross earnings before the net earnings could be ascertained. We think these cases fully sustain the position taken by the defendant in error in this case.

III.

In any event the interest upon the first mortgage bonds of these companies should be deducted from the earnings before the five per cent. in question is computed.

The reasons stated under the foregoing point also clearly establish this point, but there are additional reasons which sustain this proposition, and which remain to be considered. They are found in the tenth section of the act of Congress of July 2, 1864, which reads as follows:

"SEC. 10. *And be it further enacted*, That section five of

said act [the act of July 2, 1862,] be so modified and amended that the Union Pacific Railroad Company, the Central Pacific Railroad Company, and any other company authorized to participate in the construction of said road, may, on the completion of each section of said road, as provided in this act and the act to which this act is an amendment, issue their first mortgage bonds on their respective railroad and telegraph lines to an amount not exceeding the amount of the bonds of the United States, and of even tenor and date, time of maturity, rate and character of interest with the bonds authorized to be issued to said railroad companies respectively. And the lien of the United States bonds shall be subordinate to that of the bonds of any or either of said companies hereby authorized to be issued on their respecti e roads, property, and equipments, *except as to the provisions of the sixth section of the act to which this act is an amendment, relating to the transmission of despatches and the transportation of mails, troops, munitions of war, supplies, and public stores for the Government of the United States.*"

I desire to call the attention of the Court particularly to the exception contained in this section, and which is printed in italics. In my judgment it is a most important factor in the solution of the question now under consideration.

The precise rôle which this exception plays in the construction of this section does not seem to have been fully comprehended by some who have undertaken to construe it. In the Union Pacific case, the Chief Justice of the Court of Claims, speaking of this exception, used the following language:

"The confusion produced in that sentence, by declaring an *exception* where none in fact existed or could, in the nature of things, exist, since the matter excepted is wholly different in character from that from which it is excepted tends to confusion in its construction."

The difficulty which the Chief Justice found in construing this sentence was due to a too close adherence to lexical definitions. He was unable to see any cognate relation

between the *lien* of a Government mortgage and a right, or claim, or lien for transportation over the mortgage property also belonging to the Government. The resemblance is not perfect, still it is sufficient to excuse the average Congressman while subordinating one lien to another, for excepting the right, or claim, or lien in question, from the effect of the subordination.

Notwithstanding the slight confusion caused by the use of language not as apt as might have been chosen, I think the intent of Congress is sufficiently obvious.

As has been already stated, Congress intended not only to build these roads, but to secure for the Government certain advantages and rights in the matter of transportation, and to render those rights and advantages *perpetual*—not subject to be destroyed by any change in the ownership or control of the roads. This is evident from the last provision of the 18th section of the act of July 1, 1862, which reads as follows:

"And the better to accomplish the object of this act, namely, to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the Government *at all times*, but particularly in time of war, the *use* and *benefits* of the same for postal, military, and other purposes, Congress may at any time (having due regard to the rights of said companies named herein) add to, alter, amend, or repeal this act."

Here the intention is plainly and clearly declared to impose upon these roads as a perpetual burden or servitude or *lien* the rights in respect to transportation which are secured to the United States by the conditions contained in the sixth section. This burden, servitude, or *lien* was to run with the roads and remain forever cemented to them into whatever hands they might fall. So long as the United States held the only mortgage upon the roads this right,

claim, or lien was secure, but when it was proposed to allow another mortgage to be put upon the road, and to make it a first lien, it became apparent that this transportation right or lien would be put in jeopardy; for, should the first mortgage be foreclosed and the road be sold, the purchasers would take the roads discharged from all obligations to the United States, including that in relation to transportation. To guard against this result the exception in question was inserted in this section. Its effect is to continue the transportation obligation or *lien* forever, notwithstanding any sale or transfer under the first mortgages.

To apply this result to the question in hand: The sixth section, which contains the subject-matter of this exception, namely, the conditions in relation to transportation for the Government, also contains the condition in relation to the payment of five per cent. of the net earnings. This condition is not *included* in the exception, but is carefully *excluded* from it. Being excluded from the subject-matter of the exception it is by a well-settled canon of construction *included* in the subject-matter from which the excepted matter is taken; or, in other words, not being excepted from the effect of the act of subordination, it is included in the effect of that act, and is, therefore, subordinated to the interest of the first mortgage bonds in the same manner and to the same degree in which and to which the subsidy bonds are subordinated to the first mortgage bonds.

That such is the effect of this act of subordination may be illustrated by supposing a condition which I understand actually exists in relation to one of these roads. Suppose the earnings, remaining after all other necessary disbursements have been made, should be insufficient to pay this five per cent. and the interest on the first mortgage bonds. To which ought they to be first applied—the interest or the five per cent? There is no room for doubt. They ought to be first applied to the interest, for the obvious reason that the mortgage bonds, principal and interest, are a para-

mount lien, and by every rule governing the distribution of the assets of a debtor among his creditors, the paramount or prior lien is to be first satisfied.

Speaking to this question, in the Union Pacific case, the Chief Justice of the Court of Claims said :

"If it appeared that the earnings of the claimant's road, after paying the expenses of its management and operation, were not sufficient to pay the interest on the first mortgage bonds issued under the authority of the tenth section, we should not hesitate to hold that the Government could not demand the payment of the five per cent."

Having thus properly construed the contract the Chief Justice then declared, in effect, that the question did not arise, because the fact supposed did not exist.

With all due deference I submit that the construction of a contract cannot be one thing to-day and another thing to-morrow—depending upon the existence or non-existence of a fact *aliunde* the contract. Whether by the terms of the contract the interest on the first mortgage bonds is to be deducted from the earnings before the five per cent. claimed by the United States is computed, or the reverse, cannot depend at all upon the outside fact that there is, or is not, sufficient earnings to satisfy both claims. In declaring that the question did not arise, the Chief Justice overlooked the fact that the amount of the five per cent. claimed by the United States is greater if computed before the interest is deducted or paid, than it is if computed after the interest is deducted or paid; and hence the question is material whether there be earnings sufficient, or not, to satisfy both claims.

In conclusion, I have only to say that I have assumed, for the purpose of this argument, that this five per cent. clause still constitutes a subsisting obligation. In doing so, however, I do not intend to be understood as questioning, by

implication, the position which has been taken by others, to the effect that this five per cent. clause has been repealed *in toto* by the 10th section of the act of 1864, or that it has become obsolete by reason of certain other changes which have been made in the act of 1862, by the act of 1864.

All of which is respectfully submitted.

S. W. SANDERSON,

For Defendant in Error.

implication, the position which has been taken by others, to the effect that this five per cent. clause has been repealed *in toto* by the 10th section of the act of 1864, or that it has become obsolete by reason of certain other changes which have been made in the act of 1862, by the act of 1864.

All of which is respectfully submitted.

S. W. SANDERSON,

For Defendant in Error.